In the Supreme Court of the United States.

OCTOBER TERM, 1907.

UNITED STATES, PLAINTIFF IN ERROR,
v.
ADRIAN H. LARKIN, INTERVENOR, CLAIMANT, etc., defendant in error.
No. 356.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The writ of error in this case was taken by the Government direct from this court to the District Court for the Northern District of Ohio, to review a judgment of that court dismissing for want of jurisdiction an information to enforce the forfeiture of certain jewelry alleged to have been smuggled into the United States.

The defendant in error moved to dismiss the writ of error for want of jurisdiction, on the grounds that there was not a proper certificate of the ques-

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tion of jurisdiction in the court below, and that the jurisdiction of the court below was not in issue within the meaning of section 5 of the Judiciary Act of 1891; and, alternately, to affirm the judgment below.

By order of the court the consideration of this motion to dismiss or affirm was postponed to the hearing on the merits.

PLEADINGS.

The information alleged that the jewelry in question had been fraudulently imported into the United States at the port of New York by one Cassie L. Chadwick without entry, declaration, or payment of duty, and had been seized within the Northern District of Ohio by Charles F. Leach, collector of customs therein (R., 1).

Subsequently the defendant in error, Adrian H. Larkin, entered a special appearance in the cause, and, as claimant of the jewelry, filed a plea to the jurisdiction of the court, alleging that the jewelry had been seized by the collector in New York and fraudulently removed to Ohio, and that the court was therefore "without jurisdiction" of the action (R., 6, 8).

The Government filed a demurrer to this plea (R., 9), which was overruled (R., 10). Thereupon the Government filed a reply to the intervenor's plea to the jurisdiction, denying the seizure of the property in New York and fraudulent removal to Ohio, as alleged in the plea (R., 10).

To this reply the intervenor demurred on the ground "that the facts stated in said so-called reply

do not constitute a defense to the plea to the jurisdiction herein filed" (R., 13).

This demurrer to the Government's reply, being heard, was sustained, the court rendering an opinion reciting that practically the same questions were presented as in the demurrer to the plea and that on the facts disclosed no seizure could be made of the jewelry in the Northern District of Ohio (R., 13).

Accordingly, on May 22, 1906, a final judgment was entered, reciting on its face that "the demurrer of Adrian H. Larkin, intervenor herein, to the reply filed on June 15, 1906, to the plea of said Larkin to the *jurisdiction* of this court" was sustained, and that, the United States declining to plead further, it was ordered by the court that the information for forfeiture be dismissed; to all of which the Government excepted (R., 14). (The statement on page 7 of the brief of defendant in error on the motion to dismiss or affirm that the word "jurisdiction" is not contained in this judgment was manifestly inadvertently made.)

On July 19, 1906, as appears incidentally in the record, the Government prayed for an appeal to the United States Circuit Court of Appeals, which was allowed and perfected. Thereafter, on May 7, 1907, a mandate was filed from the Circuit Court of Appeals affirming the original judgment. (Docket entries, R., 18, 19; opinion, 153 Fed., 113.)

Subsequently, on May 21, 1907, within less than a year from the date of the original judgment, the Government filed in the district court its petition, accom-

panied by an assignment of errors, for a writ of error from this court to review the final judgment of May 22, 1906, for errors relating to the jurisdiction of the court "only" (R., 15, 16).

This writ of error was allowed by the district court, the order reciting that "the court does allow the writ of error, which shall operate as a supersedeas, and certifies that the only question in said cause is one of jurisdiction of this court" (R., 17).

ARGUMENT.

I.

Upon the record in this case it is not essential to a review of the jurisdictional question by this court that the court below should have certified the question of jurisdiction at the term at which the judgment was rendered.

It is true that where the judgment and record does not clearly show that the only question involved below and brought to this court for review is a question of jurisdiction, a certificate from the trial court as to the question of jurisdiction is essential to a review of the case by this court under section 5 of the Judiciary Act of March 3, 1891, and that in cases where such certificate is essential it should be made at the term at which the judgment below was rendered. *Colvin* v. *Jacksonville* (158 U. S., 456) and other cases.

It is, however, specifically settled by subsequent decisions of this court that where the judgment and record below, upon its face, makes it clearly apparent that the only question tried and decided below and brought to this court for review is one of juris-

diction, no certificate is necessary, and that in such case the writ of error or appeal may be prosecuted at any time within two years from the date of final judgment.

Excelsior Company v. *Bridge Company*, 185 U. S., 285.

Petri v. *Lumber Company* 199 U. S., 487.

In *Excelsior Company* v. *Bridge Company* (185 U. S., 282, 284) a bill in equity filed in the Circuit Court of the United States for the northern division of the district of Washington for the infringement of a patent was dismissed by a decree rendered November 5, 1900, upon the question of jurisdiction alone. This decree was rendered at the June term, 1900, of said court, the December term commencing on the first Tuesday in December. (Act of April 5, 1890, c. 65; 26 Stat., 45.) The complainant first appealed to the Circuit Court of Appeals, which dismissed the case upon the ground that it had no jurisdiction over the appeal. Subsequently, on May 22, 1901, at the December term of court, an appeal was taken to this court from the final decree of November 5, 1900, rendered at the preceding term. It was held that the case was properly appealed to this court, although no certificate of the trial court upon the question of jurisdiction had been made during the term at which the decree was rendered, or at any time thereafter. Mr. Justice Brown, delivering the opinion of the court, said:

> Motion is made by defendants to dismiss this appeal upon the ground that no appeal

was taken and no certificate of the trial court upon the question of jurisdiction was made by such court during the term at which the decree was rendered, and that no such certificate has since or ever been made.

As the appeal was taken directly to this court, it must appear, under the fifth section of the Court of Appeals act, either that the question of jurisdiction was certified to this court or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction. Plaintiff evidently supposed that the case was a proper one to carry to the Court of Appeals, but its appeal having been there dismissed, it took this appeal May 27, 1901, from the original decree of the Circuit Court made November 5, 1900. This decree, after reciting "that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be, and the same is hereby, dismissed for want of jurisdiction." An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction." This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court. (*Shields* v. *Coleman*, 157 U. S., 168; *In re Lehigh Mining Co.*, 156 U. S., 322; *Huntington* v. *Laidley*, 176 U. S., 668.)

> The case being thus in proper condition for appeal, such appeal could be taken at any time within two years. (*Allen* v. *Southern Pacific Railroad*, 173 U. S., 479; *Holt* v. *Indiana Manfg. Co.*, 176 U. S., 68.)

The case of *Petri* v. *Lumber Company*, 199 U. S., 487, 492, is exactly analogous to the present case and conclusive upon this question. This was an action brought in the Circuit Court of the United States for the northern division of the Northern District of Illinois to recover damages for an alleged libel. Two of the defendants filed pleas to the jurisdiction of the court, to which the plaintiffs demurred, and, on a hearing on June 16, 1903, at the December, 1902, term of the court (R. S., 658; Act of March 2, 1887, 24 Stat., 442), a district judge holding the Circuit Court overruled the demurrers and held the pleas to the jurisdiction good. The plaintiffs electing to stand upon their demurrers to the pleas, the action as to these defendants was dismissed for want of jurisdiction. The case was first taken by writ of error to the Circuit Court of Appeals, the writ being subsequently dismissed by that court. Thereafter, on June 30, 1904, being at the December, 1903, term of the Circuit Court, after an entire term, that of June, 1903, had intervened since the term at which the original judgment was entered, a circuit judge granted a writ of error to this court and certified that the only question involved was one of jurisdiction. Upon this state of facts a motion to dismiss the writ

of error for want of jurisdiction was denied by this court. Mr. Justice White, delivering the opinion, said:

> A motion to dismiss the writ of error first requires our attention. It is urged that the writ should be dismissed because the bill of exceptions filed below and the certificate made as to the question of jurisdiction on this writ of error were authenticated by a judge other than the trial judge, and, further, because the certificate was not made at the term in which the judgment complained of was entered. We are relieved, however, from the necessity of considering these objections, for the reason that *the judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matter tried and decided in the Circuit Court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions or formal certificate in respect to the matter decided was required,* and the question of jurisdiction alone was sufficiently certified to this court, as required by the act of March 3, 1891. 26 Stat., 826, 828, chapter 517, section 5. *Interior Construction and Improvement Company* v. *Gibney*, 160 U. S., 217, and cases cited; *Chappell* v. *United States*, 160 U. S., 409, 507.

This case is conclusive of the case at bar upon this point, as it appears from the decree and prior

proceedings in this case, just as in the *Petri* case, that the judgment was rendered on the demurrer to the plaintiff's reply to the plea to the jurisdiction and that the case was dismissed below on the sole ground of want of jurisdiction, and that the petition on which the writ of error was allowed asked only for a review of that judgment.

II.

The jurisdiction of the court below was in issue within the meaning of section 5 of the Judiciary Act of March 3, 1891.

The District Court sustained the demurrer to the reply to the plea to the jurisdiction and dismissed the suit on the specific ground that no lawful seizure had been made in the Northern District of Ohio.

It is well settled, however, that in an action *in rem* brought to enforce the forfeiture of merchandise seized upon the land, it is essential that it shall have been seized within the district in which the proceedings are brought, irrespective of the place in which the cause of forfeiture arose, and that unless seized within the district the court has no jurisdiction of the action.

Keene v. *United States*, 5 Cranch, 303.
The Brig Ann, 9 Cranch, 288.
The Abby, 1 Mason, 360, Fed. Cas. 14.
The Little Ann, 1 Payne, 40, Fed. Cas. 8, 397.
The Octavia, 1 Gall., 488, Fed. Cas. 10, 422.
The Fideliter, 1 Abb. (U. S.), 577, Fed. Cas. 4755.
The Washington, 4 Blatchf., 101, Fed. Cas. 17, 221.

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Section 734 of the Revised Statutes, which embodies the provisions of section 9 of the judiciary act of September 24, 1789, c. 20 (1 Stat., 73, 76), provides as follows:

> Proceedings on seizure, for forfeiture under any law of the United States, made on the high seas may be prosecuted in any district into which the property so seized is brought and proceedings instituted. *Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made,* except in cases where it is otherwise provided.

In *The Brig Ann* (9 Cranch, 288, 291), Mr. Justice Story, delivering the opinion of the court, said:

> In order to institute and perfect proceedings *in rem,* it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so when, by a seizure, it is held to ascertain and enforce a right of forfeiture which can alone be decided by a judicial decree *in rem.* If the place of committing the offense had fixed the judicial *forum* where it was to be tried, the law would have been, in numerous cases, evaded; for, by a removal of the thing from such place, the court could have had no power to enforce its decree. The legislature therefore wisely determined that the place of seizure should decide as to the proper and competent tribunal.
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> It follows, from this consideration, that before judicial cognizance can attach upon a

> forfeiture *in rem*, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent *forum*.

In *The Merino* (9 Wheat., 390, 401), Mr. Justice Washington, delivering the opinion of the court, said:

> The jurisdiction in these cases is given to the court of the district, not where the offense was committed, but where the seizure is made.

In *The Octavia* (1 Gall., U. S., 488; Fed. Cas., 10,422), Story, circuit justice, said:

> I consider that this question has been solemnly settled, * * * that the place of seizure, and not the place of committing the offense, gives the jurisdiction.

In *The Washington* (4 Blatchf., 101, Fed. Cas., 17, 221), in a libel to forfeit a vessel for a violation of the revenue laws, it was held that seizure is a jurisdictional fact necessary to give the court cognizance, and that, if not averred in the libel, advantage can be taken of this defect in any stage of the proceedings.

In *The Fideliter* (1 Abb., U. S., 577; Fed. Cas. 4755), in a libel for the condemnation of a vessel for violation of the navigation laws, the court said that the seizure is a "a material jurisdictional fact, without which the court can not proceed to decree a forfeiture."

It follows that in the present action the adjudication that the District Court did not acquire jurisdiction by reason of the fact that there was no lawful seizure within the district, brought in issue the juris-

diction of the court within the meaning of section 5 of the Judiciary Act of 1891.

The analogous rule is well settled that in actions in personam the question whether the court acquired jurisdiction of the defendant by proper service of process upon him is one involving the jurisdiction of the court within the meaning of section 5 of that act.

Shepard v. *Adams*, 168 U. S., 618.

Remington v. *Railroad Company*, 198 U. S., 95.

Board of Trade v. *Elevator Co.*, 198 U. S., 424.

A question of this character, as to whether the court, under the Federal statutes, has acquired jurisdiction of the property involved in an action *in rem*, or of the person sued in an action *in personam*, goes directly to the jurisdiction of the Federal court, as a Federal court, and is not in any sense analogous to the class of cases, such as *Smith* v. *McKay* (161 U. S., 355) and *Louisville Trust Company* v. *Knott* (191 U. S., 225), upon which the defendant in error relies, in which it has been held, as stated by Mr. Justice Harlan, in delivering the opinion in the last-named case, that, "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

The distinction between the two classes of cases is clearly drawn in *Shepard* v. *Adams* (168 U. S., 618, 622), in which it was held that the question whether the court below had acquired jurisdiction over the defendant by a valid service of process was one which could be reviewed by this court under a writ of error directly sued out under the Judiciary Act of 1891. Mr. Justice Shiras, delivering the opinion of the court, said:

> This case is brought here under section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the meaning of that term as used in the act; and the case of *Smith* v. *McKay* (161 U. S., 355) is cited as sustaining such view.
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> In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have pro-

> ceeded by an action at law which afforded an adequate remedy. * * * But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.
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> The present case differs from *Smith* v. *McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court.

In *Remington* v. *Railroad Company* (198 U. S., 95, 97), Mr. Justice Holmes, delivering the opinion of the court, said:

> It is objected by the defendant that this court has not jurisdiction, on the ground that it does not appear that the want of jurisdiction of the court below as a Federal court was the ground of the judgment. But it appears clearly that the ground of the judgment was the absence of service on the defendant, and that the plaintiff denied the validity of the attempt to remove. See *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* (185 U. S., 282, 284, 285), and cases cited. The former question was decided to be subject to review on error by this court in *Shepard* v. *Adams* (168 U. S., 618). That case has not been overruled.

In *Board of Trade* v. *Elevator Company* (198 U. S., 424), it was held, upon the authority of *Shepard* v. *Adams* and *Remington* v. *Railroad Company*, that this court could review by appeal under section 5 of the act of 1891 a judgment of the Circuit Court dismissing a bill on the sole ground that jurisdiction had never been acquired over the defendant for lack of proper service of process.

It is evident that just as in the foregoing cases it is held that the question whether the court below in an action *in personam* has acquired jurisdiction of the defendants by proper service of process, is a jurisdictional question reviewable by this court under section 5 of the Court of Appeals act, in like manner the question whether in an action *in rem* the court below has acquired jurisdiction of the property involved by a proper seizure within its district is one of jurisdiction which is subject to a like review.

Likewise in *Wetmore* v. *Rymer* (169 U. S., 115), it was held that the action of the Circuit Court in dismissing an action of ejectment on the ground that the particular land in dispute was not of sufficient value to give the court jurisdiction was reviewable by this court under section 5 of the Court of Appeals act.

III.

The present writ of error is not affected by the former appeal to the Circuit Court of Appeals.

Where the jurisdiction of the court below was the sole question in issue, and this issue was decided in favor of the defendant, thus disposing of the entire

case, the plaintiff's appeal or writ of error must be taken under section 5 of the act of March 3, 1891, directly to this court, and if taken to the Circuit Court of Appeals the proceedings in that court are a nullity.

United States v. *Jahn*, 155 U. S., 109.

Excelsior Company v. *Bridge Company*, 109 Fed., 497; 185 U. S., 282.

Petri v. *Lumber Company*, 127 Fed., 1021; 199 U. S., 487.

Union and Planters' Bank v. *Memphis*, 189 U. S., 71.

In re Aspinwall, 90 Fed., 675.

In *United States* v. *Jahn*, 155 U. S., 109, in construing the act of March 3, 1891, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

> (1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court.

In *Excelsior Company* v. *Bridge Company*, 109 Fed., 497, where the Circuit Court had dismissed a bill of complaint upon the ground that it had no jurisdiction of the controversy, an appeal to the Circuit Court of Appeals was dismissed by that, court for want of jurisdiction upon the authority of *United States* v. *Jahn*, upon the ground that, as the only question involved on the appeal was that of the jurisdiction of the Circuit Court, the question should have been taken direct to this

court. This case was subsequently taken directly from the Circuit Court to this court, where the question of jurisdiction was considered on its merits, the jurisdiction of the Circuit Court maintained, and the case remanded for further proceedings. (*Excelsior Company* v. *Bridge Company*, 185 U. S., 282.)

Exactly the same proceedings were had in *Petri* v. *Lumber Company*, where the bill having been dismissed by the Circuit Court for want of jurisdiction, the case was first taken to the Circuit Court of Appeals and the appeal there dismissed (127 Fed., 1021); and subsequently, the case being brought to this court by a direct appeal from the Circuit Court, the jurisdiction of that court was maintained and the case remanded for further proceedings. (*Petri* v. *Lumber Company*, 199 U. S., 487.)

In *Union and Planters' Bank* v. *Memphis*, 189 U. S., 71, it was held that, where a case which should have been brought directly to this court from the Circuit Court had been appealed to the Circuit Court of Appeals and there heard on the merits, on a subsequent appeal to this court from the Circuit Court of Appeals, this court would reverse the decree of the Circuit Court of Appeals, not on the merits but by reason of its want of jurisdiction, and remand the case to the Circuit Court of Appeals with directions to dismiss the appeal from the Circuit Court.

It is clear that under these authorities the proceedings on the appeal first taken in this case to the

Circuit Court of Appeals were a nullity. This is virtually conceded in the original brief for defendant in error (p. 8).

IV.

The District Court erred in sustaining the demurrer to the Government's reply to the plea to the jurisdiction of the court, and in holding that the court had no jurisdiction of the action and dismissing the information for forfeiture.

The fundamental question involved is one of great practical importance, being, in substance, whether a Government officer finding property which is possibly subject to forfeiture is compelled to seize it in the district in which he thus finds it, or whether he may properly, without seizure, take it into another district for investigation, and, upon ascertaining that it is in fact subject to forfeiture, make a seizure in such other district, upon which proceedings for forfeiture may be there instituted.

The case was heard upon the demurrer to the Government's reply to the plea of Larkin, the defendant in error, to the jurisdiction of the court.

Plea to the jurisdiction.

The plea, so far as here material, averred substantially as follows (R., 6):

That the jewelry in question had been hypothecated to one J. W. Friend as collateral security for money loaned by him to Cassie L. Chadwick, and that learning that the Treasury officials were claiming that she had smuggled a large quantity of jewelry, Friend informed the Secretary of the Treasury

that he would keep this jewelry in New York City for the inspection and examination of the Treasury Department, and being about to absent himself from New York placed the jewelry in the possession of the intervenor, Adrian H. Larkin, as attorney and bailee, with authority to conduct any business necessary to be conducted with the Treasury Department at Washington in relation thereto.

That subsequently Charles F. Leach, a collector of customs in Ohio, professing to represent the Secretary of the Treasury, came to Larkin's office in New York City and was permitted to examine the jewelry, and after such examination informed Larkin that he was in doubt whether certain of the pieces had been wrongly imported and would like to exhibit them to an expert in New York City for his opinion, and asked permission to take the jewelry away from Larkin's office for that purpose, promising to return it to Larkin at his office on that same afternoon, and that Larkin, relying upon this promise, delivered to him the jewelry, taking a receipt therefor, copy of which is filed as "Exhibit A" to the plea. This receipt is dated at New York, March 14, 1905, and reads as follows: "Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry, for examination and identification," followed by a list of the jewelry so received, but does not show where the jewelry is to be examined or whether it is to be returned at all, or when or where, merely stating that it is taken for "examination and identification." (R., 9.)

That Leach, in violation of his promise "and without the authority or permission of said Larkin or said Friend," shipped said jewelry to himself in the

city of Cleveland, Ohio, and subsequently, after returning a portion of the jewelry, retained the balance in his possession in the city of Cleveland, Ohio, and refused to return the same to Larkin or to the collector of customs in New York.

Wherefore, it was averred that these acts, done by Leach in New York, amounted either to a seizure of the property in New York or to a wrongful and fraudulent removal of the jewelry from New York to Ohio in order to make a pretended seizure in Ohio and there prosecute forfeiture proceedings instead of in New York, and hence that the court was "without jurisdiction" in the premises.

Reply to plea to jurisdiction.

The reply filed by the United States to this plea alleged, in substance, as follows (R., 10):

That Leach, learning that jewelry had been smuggled into the United States by Cassie L. Chadwick, and that it was in Cleveland, Ohio, began a search therefor, and that Friend, who had caused said jewels to be removed from Cleveland to the city of New York, having informed the Secretary of the Treasury that he had certain jewelry in his custody as collateral security in the temporary custody of one F. N. Hoffstot, as his bailee, in the city of New York, thereupon the Secretary of the Treasury summoned Leach to Washington, where he met the said Friend.

"That then and there the said J. W. Friend informed the said Charles F. Leach, collector as afore-

said, that the said articles of jewelry and merchandise, including those mentioned in the information herein filed, were in New York, in the custody of the said F. N. Hoffstot, and *that the said collector could get the said articles of jewelry and merchandise in New York and ascertain which of the said articles of merchandise and jewelry were unlawfully imported, and that if necessary for ascertaining whether or not certain of said articles of jewelry and merchandise had been unlawfully imported and were subject to seizure, that they be taken to Cleveland, Ohio, or wherever the said Charles F. Leach, collector as aforesaid, would deem it necessary to take them in order to examine into the question whether or not they were unlawfully imported.*"

"That on March 14, 1905, Leach went to New York and was shown said jewelry by Hoffstot in the office of Larkin.

"That after an examination of the jewelry aforementioned the said collector informed the said Adrian H. Larkin that he was in doubt as to which specific articles of jewelry and merchandise were unlawfully imported, and that it would be necessary for him to take such articles as to which he was in doubt and further examine them as to whether or not they had been unlawfully imported; and thereupon the said Charles F. Leach received into his care certain of the said articles of jewelry and merchandise and gave to the said Adrian H. Larkin a receipt for the same, a copy of which is set forth in the plea to the jurisdiction."

"Plaintiff further * * * denies that the said Charles F. Leach, collector as aforesaid, promised to the said Adrian H. Larkin that he would immediately return the said articles of jewelry and merchandise which he thus received into his care, and plaintiff further denies that he took said jewelry into his care merely to submit it to an expert in New York for valuation, or that he said to said Larkin or any other person that such was his purpose and intention. *But plaintiff says that only in the city of Cleveland, Ohio, could the said collector of customs, Charles F. Leach, ascertain which of the said articles were unlawfully imported, and that, with the consent of the said J. W. Friend, the said Charles F. Leach brought the said articles of jewelry and merchandise to Cleveland,* and that he there made a careful investigation and ascertained that certain of the said articles of jewelry and merchandise which he had thus brought from New York were not unlawfully imported, and these articles of jewelry and merchandise he forthwith returned to the said A. H. Larkin at New York; the remaining articles of jewelry and merchandise—that is to say, those mentioned in the information herein filed—he ascertained were unlawfully imported, and *thereupon—that is to say, on the 19th day of May, 1905, in Cleveland, Ohio—he did seize the said articles of jewelry and merchandise mentioned in the said information, and did claim title in the same for the plaintiff, the said United States.*" (R., 12.)

As the case was heard on a demurrer to the plaintiff's reply, which admitted its truth *pro hac vice*, it

is clear that, by analogy to a hearing on demurrer to an answer, all averments in this reply are to be taken as true, and only those matters alleged in the plea are to be taken as true which are not denied in the reply. (*In re Sanford Fork and Tool Company*, 160 U. S., 247, 255.)

It is insisted on behalf of defendant in error that the reply is insufficient in that it does not categorically traverse the averment of the plea that Leach promised to return the jewelry to Larkin the same afternoon, etc. It seems clear, however, that, while the reply does not, in every phrase, traverse the averments of the plea in this regard in the identical language used in the plea, nevertheless, when considered in its entirety, it is not ambiguous, and does, within the rules of modern pleading, in substance and effect traverse the material averments of the plea, though without pursuing its exact words.

The averment in the plea is that the jewelry was exhibited to Leach by Larkin, who had it in his custody as bailee of Friend, and was delivered to Leach by Larkin for examination under a promise to return it that afternoon, and that it was taken by Leach to Ohio "without the authority or permission of said Larkin *or said Friend*." (R., 7.)

The reply alleges that Friend, the pledgee, told Leach that the jewelry was in possession of one Hoffstot as his bailee, and that it was shown to him by Hoffstot in Larkin's office, and denies that Leach promised Larkin that he would immediately return the jewelry, or that he took it into his care merely

to exhibit it to an expert in New York for valuation, or that he told Larkin or any other person that such was his purpose or intention. (R., 11, 12.) It is furthermore specifically averred in the reply that Friend, the pledgee of the jewelry, told Leach at Washington, before he went to New York, that he could get the jewelry in New York, and ascertain which of it had been unlawfully imported, and, if necessary for ascertaining whether it had been lawfully imported and was subject to seizure, that it be taken to Cleveland, Ohio, or wherever Leach deemed it necessary to take it, in order to examine into the question whether it was unlawfully imported (R., 11); and later the averment is specifically repeated that Leach brought the jewelry to Cleveland "*with the consent of the said J. W. Friend.*" (R., 12.)

In the face of these specific averments, which for the present purposes are admitted by the demurrer, it is evident that the question of the promises made to Larkin is, in any event, immaterial, even if they are not in effect traversed by the reply, since irrespective of this question it is admitted by the demurrer that Leach took the jewelry to Cleveland for examination with the specific consent of Friend, the pledgee of the jewelry, and the real party in interest.

Even if it should be held that under the language of the pleadings it is admitted by the Government that Leach promised to return the jewelry to Larkin at his office on the same afternoon, this would be entirely immaterial in view of the fact that it is unde-

niably admitted by the pleadings—irrespective of any agreement between Leach and Larkin—that the jewelry was taken by Leach to Ohio with the express consent of Friend, the real party in interest, and for the express purpose of ascertaining what part of the jewelry had been unlawfully imported. Even, therefore, if Leach had violated a promise made to Larkin, a mere bailee for Friend, this would not affect the validity of a seizure subsequently made in Ohio if, under the pleadings, it appears that the seizure was not in fact made until after the jewelry had been taken to Ohio.

It, however, appears in this case, under the pleadings, that there was no seizure of the jewelry for forfeiture in New York, as the plea alleges that Larkin delivered them to Leach for the purpose of having certain of the pieces of jewelry examined by a person in New York, and the receipt itself, which is exhibited with the plea, states that they were taken by Leach for "examination and identification," without any averment whatever that they were taken or seized by Leach in New York under any claim of right on the part of the Government, while the Government's reply specifically sets forth that after being received by Leach under the receipt they were taken by him to Ohio and, after careful investigation and ascertainment as to which of the articles had been smuggled, a portion was returned to Larkin in New York and the remainder *seized* in Ohio.

It is well settled, furthermore, that irregularity in the seizure is not a defense, and that the adoption by the Government of the seizure cures any irregularity, if the goods are in fact found to be forfeitable. (*Wood* v. *United States*, 16 Pet., 342, 358; *Taylor* v. *United States*, 3 How., 197, 205; *United States* v. *Twenty-five Cases of Cloths* (Crabbe, 356), Fed. Cas., 16563.)

In *Wood* v. *United States* (16 Pet., 342, 358), Mr. Justice Story, delivering the opinion of the court, said:

> It is of no consequence whatsoever what were the original grounds of the seizure, whether they were well founded or not, if, in point of fact, the goods are by law subjected to forfeiture; for *the United States are not bound down, by the acts of the seizors, to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it*, if, in point of fact, the seizure can now be maintained as founded upon an actual forfeiture thereof at the time of the seizure.

In *United States* v. *Twenty-five Cases of Cloths* (Crabbe, 356; Fed. Cas., 16563), the court said:

> The irregularity of the seizure, even if there was an irregularity, can not avail the claimants on this trial; it is no defense for them against the charge of fraud, or the claim of property in these goods by the United States. If the officers were guilty of a trespass, they must answer for it, if the claimants shall find it expedient to bring their action for it.

It follows under these authorities that even if it should be held that the reply admits that Leach

agreed with Larkin to return the jewelry the same afternoon, this would be an entirely immaterial matter, going merely to the personal conduct of the collector, which would not affect in any manner the jurisdiction of the court in Ohio, provided it appears from the pleadings that in fact Leach did not seize the jewelry in New York and did in fact seize it for the first time in Ohio.

The crucial question is, therefore, whether these pleadings show a seizure by Leach in New York or in Ohio, for, as that question is determined, the courts of Ohio or of New York would have jurisdiction of this proceeding.

The case, therefore, under the admissions made by the intervenor's demurrer, resolves itself into this specific question: Whether a collector who finds property which he suspects has been smuggled can lawfully take it into his possession with the consent of the owner, without seizure, for the preliminary purpose of taking it to another place for identification and ascertaining whether it was in fact smuggled, and may subsequently seize it upon becoming satisfied that it was smuggled; or whether the simple fact that it was first taken into his possession for the mere purpose of examination constitutes such a seizure that it can not thereafter be seized by him at any later time or any different place.

Upon this point the Government earnestly insists that *since* it appears on the face of the pleadings, both from the plea and the reply, that no adverse claim of

right was asserted on the part of the Government while the jewelry was in New York, that it was first seized with the assertion of title on the part of the United States in Ohio, and that the collector there for the first time refused to restore its possession to the claimant, it follows that the seizure was there made and jurisdiction in an action of forfeiture there attached.

It is well settled under the authorities that to constitute a seizure of property by an officer for forfeiture there must be not merely a finding and taking into possession by the officer, but such taking into possession must be accompanied by a claim to its possession adverse to the owner and the exercise of authority over it as an assertion of right on the part of the Government; and that the mere finding of the property and taking of it into possession by an officer for the purpose of further examination to determine whether it is subject to forfeiture is not a seizure, there being in such case no seizure for forfeiture until the adverse claim of the Government is asserted.

1. The authoritative definitions of seizure clearly show that the mere finding or taking into possession without the assertion of an adverse claim on the part of the Government is not a seizure.

The Josefa Segunda, 10 Wheat., 312, 325.
The Missouri, 3 Ben., 508, Fed. Cas., 9, 652.
The Saratoga, 9 Fed., 322, 326.
Elme's Law of the Customs, sec. 773.
Conkling's Treatise, 5th ed., 486.
Customs Regulations, art. 1492.

In *The Josefa Segunda*, 10 Wheat., 312, 325, in a proceeding against a vessel and the negroes taken on board of her under the slave trade act of March 3, 1807, in which it was held that the evidence did not show that there had been a valid seizure of the vessel by the revenue inspector Roberts, Mr. Justice Story, delivering the opinion, said:

> In respect to the claim of Mr. Roberts, we do not think that the evidence establishes that he ever made any valid seizure of the vessel. It is not sufficient that he intended to make one. * * * *There must be an open, visible possession claimed, and authority exercised, under a seizure. The parties must understand that they are dispossessed,* and that they are no longer at liberty to exercise any dominion on board of the ship. * * * But here Mr. Roberts gave no notice of the seizure to the persons on board; he exercised no authority and claimed no possession. He had no force adequate to compel submission; and his appearance in the vessel gave no other character to him than that of an inspector, rightfully on board, in performance of his ordinary duties. *To construe such an equivocal act as a seizure would be unsettling principles.*

The definition of seizure which is given in the Customs Regulations follows exactly that given by Mr. Justice Story in the *Josepha Secunda* case. In article 1492 it is said:

> To constitute a valid seizure there must be open, visible possession claimed, and authority exercised under the seizure.

This same definition is given, *ipsissimis verbis*, in Conkling's Treatise, 5th ed., 486, and in substantially identical words in Elme's Law of the Customs, section 773.

In *The Saratoga* (9 Fed., 322, 326), in which it was held that the word "seizure," as used in the act of February 8, 1881, embraced seizures by the marshal under legal processes for the enforcement of a penalty as well as seizures by revenue officers for the purposes of forfeiture, the court said:

> To seize is to "take hold of suddenly and forcibly; to take possession of by force." (Worcester's Dict.) * * * As respects the fact of seizure, it matters not by what legal officer or in what kind of a proceeding such forcible possession is taken. * * * Whether done by the one or by the other, the act of each, the seizure itself, the forcible taking possession, is precisely the same in both cases.

In *The Missouri* (3 Ben., 508, Fed. Cas., 9, 652) it was said by Benedict, district judge:

> *A seizure is an assertion of title in the Government*, and the subsequent proceedings in court are proceedings to try the title so asserted.

2. It is well settled that merchandise is not seized for forfeiture when first found and taken into possession by the Government officers for purposes merely of further examination, but only when, after such examination, the Government's claim is asserted.

Four Packages v. *United States*, 97 U. S., 404.
Friedenstein v. *United States*, 125 U. S., 224, 229.

In *Four Packages* v. *United States* (97 U. S., 404) an information was filed in the District Court for the Southern District of New York against four packages of goods seized by the collector of customs at the port of New York on the ground that they had been unladen and delivered from the steamship within said port without a permit therefor. The proof showed that on the arrival of the steamer at the dock in Hoboken, N. J., in another district, these packages were unladen and delivered on the dock from the vessel, and were there found by the inspectors of customs, who opened two of the packages and examined them, and, finding that they contained dutiable goods not on the manifest, placed upon all of the four packages marks to show that they had not been passed, and sent them to Castle Garden for further inspection. On a writ of error to review a judgment of forfeiture rendered below, the first assignment of error in this court was that the seizure of the goods was not made within the jurisdiction of the District Court, but in the district of New Jersey, where the customs officers took charge of the goods and deprived the claimants of their possession. The court said on this point:

> Much discussion of the first assignment of error is unnecessary, as it is clear that the seizure of the four packages was made at

> Castle Garden, where the goods were sent by the inspectors present on the wharf for final examination. Sufficient appears to show that the duties in such cases are never collected on the wharf; that the examination made is only for the purpose of passing the baggage which does not contain dutiable articles, and that the baggage which does contain dutiable goods is uniformly sent to Castle Garden for the collection of the duties, or to be dealt with as the law directs. *Suffice it to say, that no seizure was made on the wharf where the goods were landed, and that the proceedings in sending the goods to the place where the seizure was made was in all respects correct and in accordance with the usage.* (*The Propeller Commerce*, 1 Black, 574; 3 Greenl. Evid. (8th ed.), sec. 395; *The Slavers* (*Kate*), 2 Wall., 350.)
>
> *Due seizure was made in this case at Castle Garden*, and consequently the first assignment of errors must be overruled.

This case distinctly recognizes the general principle that goods subject to forfeiture are not necessarily seized when they are first taken into the possession of customs officers, but that although first found and coming into such possession in one district they may be properly sent by the officers to another district for further examination before actual seizure, and that when thereafter seized in such other district the District Court therein has jurisdiction of the forfeiture proceedings.

The case of *Friedenstein* v. *United States* (125 U. S., 224, 229) is conclusive upon the question that the seizure of goods by an officer is not necessarily made at the time when they are "found" by him and taken into his possession, but that when he merely suspects that they are subject to forfeiture and takes them into his possession for further investigation merely, they are not at that time seized. This was an information to condemn certain diamonds seized as forfeited under the customs revenue laws. On the trial the customs officer testified that he found the diamonds at a store at No. 66 Nassau street, with a Mrs. Sussman, to whose custody the diamonds had been intrusted by the claimant for sale; that he requested Mrs. Sussman to accompany him to the custom-house, as he wished to make some inquiries about the diamonds, and that if her explanation was satisfactory he did not intend to seize them; that after they arrived at the custom-house and before the package was opened a conversation took place between himself and Mrs. Sussman, which, over objection, he related; and that after the package had been opened and he was through with his investigation the seizure was made at the custom-house. It was held that the trial court did not err in admitting the evidence of the statements made by Mrs. Sussman at the custom-house, or in permitting the custom-house officer to testify that although he took physical possession of the property at 66 Nassau street, he did not

make the actual seizure until he made it at the custom-house after the conversations with her. Mr. Justice Blatchford, delivering the opinion of the court, said:

> *It is plain, on the testimony, that the goods were not seized for forfeiture until after the conversation, and that the seizure took place at the custom-house,* after the investigation and examination there, and did not take place at 66 Nassau street. (See *Four Packages* v. *United States,* 97 U. S., 404, 411.) * * * Under these circumstances Mrs. Sussman's declarations to Brackett in regard to the goods, while he was making an official investigation and *examination as to whether they should be seized for forfeiture,* were part of the res gestæ, and admissible in evidence as against the person claiming to be the owner of the goods in a suit *in rem* for their forfeiture.

This case specifically recognizes the right of a customs officer, after finding suspected property, to take it into possession for further examination merely, without making actual seizure until convinced it is subject to forfeiture.

Article 1494 of the Customs Regulations provides that—

> Collectors will be prompt to take the proper steps to enforce forfeitures and penalties, but will avoid involving the Government in litigation upon slight cause or mere suspicion.

This article was direct authority for the course pursued by the collector, who, on the facts stated in the Government's reply, would appear to have very

properly refrained from seizing the property in New York, where its smuggling was merely suspected—and where, it may well be, the parties who alone could identify it did not reside—and to have postponed its seizure until after the property had been taken to Ohio and so identified as smuggled property as to justify its seizure; the propriety of this course being emphasized by the fact, which appears from the intervenor's plea as well as from the Government's reply, that after the investigation in Ohio had shown that part of the jewelry which Leach had taken there had not been unlawfully imported, such portion of the jewelry was returned to the intervenor in New York, and unnecessary litigation and annoyance to the pledgee in respect to such portion of the jewelry thereby obviated. (Plea, R., 7; reply, R., 12.)

To justify an officer in seizing there must be probable cause for seizure (*United States* v. *Gay*, 2 Gall. (U. S.), 359, Fed. Cas., 15193; *United States* v. *Cook*, 1 Sprague (U. S.), 213, Fed. Cas., 14852).

Therefore, as the intervenor did not see proper in the court below to file a rejoinder and put in issue the facts alleged in the Government's reply, but by demurring thereto admitted its truth for the purpose of the hearing, and as this reply specifically and unequivocally avers that the jewelry was taken to Ohio for examination with the express consent of J. W. Friend, the real claimant thereto, and that after investigation there it was seized and title claimed for the United States in Cleveland, Ohio

(R., 12), it is respectfully submitted that under the doctrine of the *Four Packages* case and *Friedenstein* v. *United States*, and the other authorities hereinabove cited, jurisdiction to enforce its forfeiture was conferred by such seizure upon the District Court in Ohio, and that the demurrer to the Government's reply should have been overruled and the case proceeded with to a hearing on the merits.

Respectfully submitted.

EDWARD T. SANFORD,
Assistant Attorney-General.

DECEMBER, 1907.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

UNITED STATES, PLAINTIFF IN ERROR,
v.
ADRIAN H. LARKIN, INTERVENOR, COMPLAINANT, etc., defendant in error. } No. 356.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

REPLY BRIEF FOR THE UNITED STATES ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

The writ of error in this case was taken by the Government direct from this court to the District Court for the Northern District of Ohio, to review a judgment of that court dismissing for want of jurisdiction an information to enforce the forfeiture of certain jewelry smuggled into the United States.

Defendant in error has moved to dismiss this writ of error for want of jurisdiction in this court, or, alternately, to affirm the judgment below.

The information alleged that the jewelry in question had been fraudulently imported into the United States at the port of New York by one Cassie L.

Chadwick without entry, declaration, or payment of duty, and had been seized within the northern district of Ohio by Charles F. Leach, collector of customs therein (R., 1).

Subsequently the defendant in error, Adrian H. Larkin, entered a special appearance in the cause, and, as claimant of the jewelry, filed a plea to the jurisdiction of the court, alleging that the jewelry had been seized by the collector in New York and fraudulently removed to Ohio, and that the court was therefore "without jurisdiction" of the action (R., 6, 8).

The Government filed a demurrer to this plea (R., 9), which was overruled (R., 10). Thereupon the Government filed a reply to the intervenor's plea to the jurisdiction, denying the seizure of the property in New York and fraudulent removal to Ohio, as alleged in the plea (R., 10).

To this reply the intervenor demurred on the ground "that the facts stated in said so-called reply do not constitute a defense to the plea to the jurisdiction herein filed" (R., 13).

This demurrer to the Government's reply, being heard, was sustained, the court rendering an opinion reciting that practically the same questions were presented as in the demurrer to the plea and that on the facts disclosed no seizure could be made of the jewelry in the northern district of Ohio (R., 13).

Accordingly, on May 22, 1906, a final judgment was entered dismissing the information, reciting on its face

that "the demurrer of Adrian H. Larkin, intervenor herein, to the reply filed on June 15, 1906, to the plea of said Larkin to the *jurisdiction* of this court" was sustained, and that, the United States declining to plead further, it was ordered by the court that the information for forfeiture be dismissed; to all of which the Government excepted (R., 14). (The statement on page 7 of the brief of defendant in error that the word "jurisdiction" is not contained in this judgment is manifestly inadvertently made.)

On July 19, 1906, as appears incidentally in the record, the Government prayed for an appeal to the United States Circuit Court of Appeals, which was allowed and perfected. Thereafter, on May 7, 1907, a mandate was filed from the Circuit Court of Appeals affirming the original judgment. (Docket entries, R., 18, 19; opinion, 153 Fed., 113.)

Subsequently, on May 21, 1907, within less than than a year from the date of the original judgment, the Government filed in the district court its petition, accompanied by an assignment of errors, for a writ of error from this court to review the final judgment of May 22, 1906, for errors relating to the jurisdiction of the court "only" (R., 15,16).

This writ of error was allowed by the district court, the order reciting that "the court does allow the writ of error, which shall operate as a supersedeas, and certifies that the only question in said cause is one of jurisdiction of this court" (R., 17).

ARGUMENT.

I.

Upon the record in this case it is not essential to a review of the jurisdictional question by this court that the court below should have certified the question of jurisdiction at the term at which the judgment was rendered.

It is true that where the judgment and record does not clearly show that the only question involved below and brought to this court for review is a question of jurisdiction, a certificate from the trial court as to the question of jurisdiction is essential to a review of the case by this court under section 5 of the judiciary act of March 3, 1891, and that in cases where such certificate is essential it should be made at the term at which the judgment below was rendered. *Colvin* v. *Jacksonville* (158 U. S., 456) and other cases.

It is, however, specifically settled by subsequent decisions of this court that where the judgment and record below, upon its face, makes it clearly apparent that the only question tried and decided below and brought to this court for review is one of jurisdiction, no certificate is necessary, and that in such case the writ of error or appeal may be prosecuted at any time within two years from the date of final judgment.

Excelsior Company v. *Bridge Company*, 185 U. S., 285.

Petri v. *Lumber Company*, 199 U. S., 487.

In *Excelsior Company* v. *Bridge Company* (185 U. S., 282, 284) a bill in equity filed in the Circuit Court of

the United States for the northern division of the district of Washington for the infringement of a patent was dismissed by a decree rendered November 5, 1900, upon the question of jurisdiction alone. This decree was rendered at the June term, 1900, of said court, the December term commencing on the first Tuesday in December. (Act of April 5, 1890, c. 65; 26 Stat., 45.) The complainant first appealed to the Circuit Court of Appeals, which dismissed the case upon the ground that it had no jurisdiction over the appeal. Subsequently, on May 22, 1901, at the December term of court, an appeal was taken to this court from the final decree of November 5, 1900, rendered at the preceding term. It was held that the case was properly appealed to this court, although no certificate of the trial court upon the question of jurisdiction had been made during the term at which the decree was rendered, or at any time thereafter. Mr. Justice Brown, delivering the opinion of the court, said:

> Motion is made by defendants to dismiss this appeal upon the ground that no appeal was taken and no certificate of the trial court upon the question of jurisdiction was made by such court during the term at which the decree was rendered, and that no such certificate has since or ever been made.
>
> As the appeal was taken directly to this court, it must appear, under the fifth section of the Court of Appeals act, either that the question of jurisdiction was certified to this court or that the decree appealed from shows upon

its face that the sole question decided was one of jurisdiction. Plaintiff evidently supposed that the case was a proper one to carry to the Court of Appeals, but its appeal having been there dismissed, it took this appeal May 27, 1901, from the original decree of the Circuit Court made November 5, 1900. This decree, after reciting "that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be, and the same is hereby, dismissed for want of jurisdiction." An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction." This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court. (*Shields* v. *Coleman*, 157 U. S., 168; *In re Lehigh Mining Co.*, 156 U. S., 322; *Huntington* v. *Laidley*, 176 U. S., 668.)

The case, being thus in proper condition for appeal, such appeal could be taken at any time within two years. (*Allen* v. *Southern Pacific Railroad*, 173 U. S., 479; *Holt* v. *Indiana Manfg. Co.*, 176 U. S., 68.)

The case of *Petri* v. *Lumber Company*, 199 U. S., 487, 492, is exactly analogous to the present case and conclusive upon this question. This was an action brought in the Circuit Court of the United States for

the northern division of the northern district of Illinois to recover damages for an alleged libel. Two of the defendants filed pleas to the jurisdiction of the court, to which the plaintiffs demurred, and, on a hearing on June 16, 1903, at the December, 1902, term of the court (R. S., 658; Act of March 2, 1887, 24 Stat., 442), a district judge holding the Circuit Court overruled the demurrers and held the pleas to the jurisdiction good. The plaintiffs electing to stand upon their demurrers to the pleas, the action as to these defendants was dismissed for want of jurisdiction. The case was first taken by writ of error to the Circuit Court of Appeals, and on dismissal of the writ by that court, on June 30, 1904, being at the December, 1903, term of court, after an entire term, that of June, 1903, had intervened, a circuit judge granted a writ of error to this court and certified that the only question involved was one of jurisdiction. Upon this state of facts a motion to dismiss the writ of error for want of jurisdiction was denied by this court. Mr. Justice White, delivering the opinion, said:

> A motion to dismiss the writ of error first requires our attention. It is urged that the writ should be dismissed because the bill of exceptions filed below and the certificate made as to the question of jurisdiction on this writ of error were authenticated by a judge other than the trial judge, and further, because the certificate was not made at the term in which the judgment complained of was entered. We are relieved, however, from the necessity of considering these objections, for the reason

> that the judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matter tried and decided in the circuit court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions or formal certificate in respect to the matter decided was required, and the question of jurisdiction alone was sufficiently certified to this court, as required by the act of March 3, 1891. 26 Stat., 826, 828, chapter 517, section 5. *Interior Construction and Improvement Company* v. *Gibney*, 160 U. S., 217, and cases cited; *Chappell* v. *United States*, 160 U. S., 409, 507.

This case is conclusive of the case at bar upon this point, as it appears from the decree and prior proceedings in this case, just as in the Petri case, that the judgment was rendered on the demurrer to the plaintiff's reply to the plea to the jurisdiction and that the case was dismissed below on the sole ground of want of jurisdiction.

II.

The jurisdiction of the court below was in issue within the meaning of section 5 of the judiciary act of March 3, 1891.

The district court sustained the demurrer to the reply to the plea to the jurisdiction and dismissed

the suit on the specific ground that no lawful seizure had been made in the northern district of Ohio.

It is well settled, however, that in an action *in rem* brought to enforce the forfeiture of merchandise seized upon the land, it is essential that it shall have been seized within the district in which the proceedings are brought, irrespective of the place in which the cause of forfeiture arose, and that unless seized within the district the court has no jurisdiction of the action.

> *Keene* v. *United States*, 5 Cranch, 303.
> *The Brig Ann*, 9 Cranch, 288.
> *The Abby*, 1 Mason, 360, Fed. Cas. 14.
> *The Little Ann*, 1 Paine, 40, Fed. Cas. 8, 397.
> *The Octavia*, 1 Gall., 488, Fed. Cas. 10, 422.
> *The Washington*, 4 Blatchf, 101, Fed. Cas. 17, 221.

Section 734 of the Revised Statutes, which embodies the provisions of section 9 of the judiciary act of September 24, 1789, c. 20 (1 Stat., 73, 76) provides as follows:

> Proceedings on seizure, for forfeiture under any law of the United States, made on the high seas may be prosecuted in any district into which the property so seized is brought and proceedings instituted. *Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made*, except in cases where it is otherwise provided.

In *The Brig Ann* (9 Cranch, 288, 291), Mr. Justice Story, delivering the opinion of the court, said:

> In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so when, by a seizure, it is held to ascertain and enforce a right of forfeiture which can alone be decided by a judicial decree *in rem*.

In *The Merino* (9 Wheat., 390, 401), Mr. Justice Washington, delivering the opinion of the court, said:

> The jurisdiction in these cases is given to the court of the district, not where the offense was committed, but where the seizure is made.

In *The Octavia* (1 Gall., U. S., 488; Fed. Case, 10422), Story, circuit justice, said:

> I consider that this question has been solemnly settled, * * * that the place of seizure, and not the place of committing the offense, gives the jurisdiction.

In *The Washington* (4 Blatchf., 101; Fed. Cas., 17,221), in a libel of information to forfeit a vessel for a violation of the revenue laws, it was held seizure is a jurisdictional fact necessary to give the court cognizance, and that, if not averred in the libel, advantage can be taken of this defect in any stage of the proceedings.

It follows that in the present action the adjudication that the District Court did not acquire jurisdic-

tion by reason of the fact that there was no lawful seizure within the district, brought in issue the jurisdiction of the court within the meaning of section 5 of the judiciary act of 1891.

The analogous rule is well settled that in actions *in personam* the question whether the court acquired jurisdiction of the defendant by proper service of process is one involving the jurisdiction of the court within the meaning of section 5 of that act.

Shepard v. *Adams*, 168 U. S., 618.

Remington v. *Railroad Company*, 198 U. S., 95.

Board of Trade v. *Elevator Co.*, 198 U. S., 424.

A question of this character going to the specific question as to whether the court, under the Federal statutes, has acquired jurisdiction of the property involved in an action *in rem*, or of the person sued in an action *in personam*, goes directly to the jurisdiction of the Federal court, as a Federal court, and is not in any sense analogous to the class of cases, such as *Smith* v. *McKay* (161 U. S., 355) and *Louisville Trust Company* v. *Knott* (191 U. S., 225), upon which the defendant in error relies, in which it has been held, as stated by Mr. Justice Harlan, in delivering the opinion in the last-named case, that, "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of

practice governing courts of concurrent jurisdiction as between each other."

The distinction between the two classes of cases is clearly drawn in *Shepard* v. *Adams* (168 U. S., 618, 622), in which it was held that the question whether the court below had acquired jurisdiction over the defendant by a valid service of process was one which could be reviewed by this court under a writ of error directly sued out under the Judiciary Act of 1891. Mr. Justice Shiras, delivering the opinion of the court, said:

> This case is brought here under section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the meaning of that term as used in the act; and the case of *Smith* v. *McKay* (161 U. S., 355) is cited as sustaining such view.
>
> In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of assert-

> ing his right by a bill in equity, should have proceeded by an action at law which afforded an adequate remedy. * * * But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.
>
> The present case differs from *Smith* v. *McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court.

In *Remington* v. *Railroad Company* (198 U. S., 95, 97), Mr. Justice Holmes, delivering the opinion of the court, said:

> It is objected by the defendant that this court has not jurisdiction, on the ground that it does not appear that the want of jurisdiction of the court below as a Federal court was the ground of the judgment. But it appears clearly that the ground of the judgment was the absence of service on the defendant, and that the plaintiff denied the validity of the attempt to remove. See *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* (185 U. S., 282, 284, 285), and cases cited. The former question was decided to be subject to review on error by this court in *Shepard* v. *Adams* (168 U. S., 618). That case has not been overruled.

In *Board of Trade* v. *Elevator Company* (198 U. S., 424), it was held, upon the authority of *Shepard* v. *Adams* and *Remington* v. *Railroad Company*, that this court could review by appeal under section 5 of the act of 1891 a judgment of the Circuit Court dismissing a bill on the sole ground that jurisdiction had never been acquired over the defendant for lack of proper service of process.

It is evident that just as in the foregoing cases it is held that the question whether the court below in an action *in personam* has acquired jurisdiction of the defendants by proper service of process, is a jurisdictional question reviewable by this court under section 5 of the court of appeals act, in like manner the question whether in an action *in rem* the court below has acquired jurisdiction of the property involved by a proper seizure within its district is one of jurisdiction which is subject to a like review.

Likewise in *Wetmore* v. *Rymer* (169 U. S., 115), it was held that the action of the Circuit Court in dismissing an action of ejectment on the ground that the land in dispute was not of sufficient value to give the court jurisdiction was reviewable by this court under section 5 of the court of appeals act.

III.

The present writ of error is not affected by the former appeal to the Circuit Court of Appeals.

Where the jurisdiction of the court below was the sole question in issue, and this issue was decided in favor of the defendant, thus disposing

of the entire case, the plaintiff's appeal or writ of error must be taken under section 5 of the act of March 3, 1891, directly to this court, and if taken to the Circuit Court of Appeals the proceedings in that court are a nullity.

United States v. *Jahn*, 155 U. S., 109.

Excelsior Company v. *Bridge Company*, 109 Fed., 497; 185 U. S., 282.

Petri v. *Lumber Company*, 127 Fed., 1021; 199 U. S., 487.

Union and Planters' Bank v. *Memphis*, 189 U. S., 71.

In re Aspinwall, 90 Fed., 675.

In *United States* v. *Jahn*, 155 U. S., 109, in construing the act of March 3, 1891, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

> (1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court.

In *Excelsior Company* v. *Bridge Company*, 109 Fed., 497, where the Circuit Court had dismissed a bill of complaint upon the ground that it had no jurisdiction of the controversy, an appeal to the Circuit Court of Appeals was dismissed by that court for want of jurisdiction upon the authority of *United States* v. *Jahn*, upon the ground that as the only question involved on the appeal was that of the jurisdiction of the Circuit Court, the question should have been taken direct to *this*

Court. This case was subsequently taken directly from the Circuit Court to this court, where the question of jurisdiction was considered on its merits, the jurisdiction of the Circuit Court maintained, and the case remanded for further proceedings. *Excelsior Company* v. *Bridge Company*, 185 U. S., 282.

Exactly the same proceedings were had in *Petri* v. *Lumber Company*, where the bill having been dismissed by the Circuit Court for want of jurisdiction the case was first taken to the Circuit Court of Appeals and the appeal there dismissed (127 Fed., 1021), and subsequently the case being brought to this court by a direct appeal from the Circuit Court the jurisdiction of that court was maintained and the case remanded for further proceedings. (*Petri* v. *Lumber Company*, 199 U. S., 487.)

In *Union and Planters Bank* v. *Memphis*, 189 U. S., 71, it was held that where a case which should have been brought directly to this court from the Circuit Court, had been appealed to the Circuit Court of Appeals and there heard on the merits, on a subsequent appeal to this court from the Circuit Court of Appeals, this court would reverse the decree of the Circuit Court of Appeals, not on the merits, but by reason of its want of jurisdiction, and remand the case to the Circuit Court of Appeals with directions to dismiss the appeal from the Circuit Court.

It is clear that under these authorities the proceedings on the appeal first taken in this case to the Circuit Court of Appeals were a nullity. This is virtually conceded in the brief for defendant in error (p. 8).

IV.

The Jurisdictional Question Involved is Meritorious.

The fundamental question involved is one of great practical importance, being in substance the question whether a Government officer is compelled to seize property which he suspects to be subject to forfeiture in the district in which it is first found by him, or whether he may properly, without seizure, take such property into another district for investigation, and, upon being convinced that the property is in fact subject to forfeiture, make a seizure in such other district, upon which proceedings for forfeiture may be there instituted.

The case was heard upon the demurrer to the Government's reply to the plea of Larkin, the defendant in error, to the jurisdiction of the court.

The plea, so far as here material, avers substantially as follows (R., 6):

That the jewelry in question had been hypothecated to one J. W. Friend as collateral security for money loaned by him to Cassie L. Chadwick, and that learning that the Treasury officials were claiming that she had smuggled a large quantity of jewelry, Friend informed the Secretary of the Treasury that he would keep this jewelry in New York City for

the inspection and examination of the Treasury Department, and being about to absent himself from New York placed the jewelry in the possession of Larkin, as attorney and bailee, with authority to conduct any business necessary to be conducted with the Treasury Department at Washington in relation thereto.

That subsequently Charles F. Leach, a collector of customs in Ohio, professing to represent the Secretary of the Treasury, came to Larkin's office in New York City and was permitted to examine the jewelry, and after such examination informed Larkin that he was in doubt whether certain of the pieces had been wrongly imported and would like to exhibit them to an expert in New York City for his opinion, and asked permission to take the jewelry away from Larkin's office for that purpose, promising to return it to Larkin at his office on that same afternoon, and that Larkin, relying upon this promise, delivered to him the jewelry, taking a receipt therefor, copy of which is filed as "Exhibit A" to the plea. [This receipt is dated at New York March 14, 1905, and reads as follows: "Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry for examination and identification," followed by a list of the jewelry so received, but does not show where the jewelry is to be examined or whether it is to be returned at all, or when or where, merely stating that it is taken for "examination and identification." (R., 9).]

That Leach, in violation of his promise "and without the authority or permission of said Larkin or said Friend," shipped said jewelry to himself in the city of Cleveland, Ohio, and subsequently, after returning a portion of the jewelry, retained the balance in his possession in the city of Cleveland, Ohio, and refused to return the same to said Larkin or to the collector of customs in the city of New York.

Wherefore it is averred that either these acts done by Leach in New York amounted to a seizure of the property in New York or to a wrongful and fraudulent removal of the jewelry from New York to Ohio in order to make a pretended seizure in Ohio and there prosecute forfeiture proceedings instead of in New York; and it was insisted that the court was "without jurisdiction" in the premises.

The reply filed by the United States to this plea alleged in substance as follows (R., 10):

That Leach, learning that jewelry had been smuggled into the United States by Cassie L. Chadwick, and that it was in Cleveland, Ohio, began a search therefor, and that J. W. Friend, who had caused said jewels to be removed from Cleveland to the city of New York, having informed the Secretary of the Treasury that he had certain jewelry in his custody as collateral security in the temporary custody of one F. N. Hoffstot, as his bailee, in the city of New York, thereupon the Secretary of the Treasury summoned Leach to Washington, where he met the said Friend.

"That then and there the said J. W. Friend informed the said Charles F. Leach, collector as aforesaid, that the said articles of jewelry and merchandise, including those mentioned in the information herein filed, were in New York, in the custody of the said F. N. Hoffstot, and *that the said collector could get the said articles of jewelry and merchandise in New York and ascertain which of the said articles of merchandise and jewelry were unlawfully imported, and that if necessary for ascertaining whether or not certain of said articles of jewelry and merchandise had been unlawfully imported and were subject to seizure, that they be taken to Cleveland, Ohio, or wherever the said Charles F. Leach, collector as aforesaid, would deem it necessary to take them in order to examine into the question whether or not they were unlawfully imported.*"

That on March 14, 1905, said Leach went to New York and was shown said jewelry by the said Hoffstot in the office of said Larkin.

"That after an examination of the jewelry aforementioned the said collector informed the said Adrian H. Larkin that he was in doubt as to which specific articles of jewelry and merchandise were unlawfully imported, and that it would be necessary for him to take such articles as to which he was in doubt and further examine them as to whether or not they had been unlawfully imported; and thereupon the said Charles F. Leach received into his care certain of the said articles of jewelry and merchandise and gave to the said Adrian H. Larkin a receipt for the same, a

copy of which is set forth in the plea to the jurisdiction herein filed."

"Plaintiff further says that it denies that the said Charles F. Leach, collector as aforesaid, promised to the said Adrian H. Larkin that he would immediately return the said articles of jewelry and merchandise which he thus received into his care, and plaintiff further denies that he took said jewelry into his care merely to submit it to an expert in New York for valuation, or that he said to said Larkin or any other person that such was his purpose and intention. But plaintiff says that only in the city of Cleveland, Ohio, could the said collector of customs, Charles F. Leach, ascertain which of the said articles were unlawfully imported, and that, *with the consent of the said J. W. Friend, the said Charles F. Leach brought the said articles of jewelry and merchandise to Cleveland*, and that he there made a careful investigation and ascertained that certain of the said articles of jewelry and merchandise which he had thus brought from New York were not unlawfully imported, and these articles of jewelry and merchandise he forthwith returned to the said A. H. Larkin at New York; the remaining articles of jewelry and merchandise—that is to say, those mentioned in the information herein filed—he ascertained were unlawfully imported, and *thereupon—that is to say, on the 19th day of May, 1905, in Cleveland, Ohio, he did seize the said articles of jewelry and merchandise mentioned in the said information, and did claim*

title in the same for the plaintiff, the said United States." (R., 12.)

As the case was heard on a demurrer to the plaintiff's reply which admitted its truth, it is clear that by analogy to a hearing on demurrer to an answer, all averments in this reply are to be taken as true and only those matters alleged in the plea are to be taken as true, which are not denied in the reply. (*In re Sanford Fork and Tool Company*, 160 U. S., 247, 255.)

It is insisted on behalf of defendant in error that the reply is insufficient in that it does not categorically traverse the averment of the plea that Leach promised to return the jewelry to Larkin the same afternoon, etc. It seems clear, however, that while the reply does not, in every phrase, traverse the averments of the plea in this regard in the identical language used in the plea, nevertheless, when considered in its entirety, it is not ambiguous, and does, within the rules of modern pleading, in substance and effect traverse the material averments of the plea, though without pursuing its exact words.

The averment in the plea is that the jewelry was exhibited to Leach by Larkin, who had it in his custody as bailee of Friend, and was delivered to Leach by Larkin for examination under a promise to return it that afternoon, and that it was taken by Leach to Ohio "without the authority or permission of said Larkin or said Friend." (R., 7).

The reply alleges that Friend, the pledgee, told

Leach that the jewelry was in possession of one Hoffstot as his bailee and that it was shown to him by Hoffstot in Larkin's office, and denies that Leach promised Larkin that he would immediately return the jewelry, or that he took it into his care merely to exhibit it to an expert in New York for valuation, or that he told Larkin or any other person that such was his purpose or intention (R. 11, 12). It is furthermore specifically announced in the reply that Friend, the pledgee of the jewelry, told Leach at Washington, before he went to New York, that he could get the jewelry in New York, and ascertain which of it had been unlawfully imported, and, if necessary for ascertaining whether it had been lawfully imported and was subject to seizure, that it be taken to Cleveland, Ohio, or wherever Leach deemed it necessary to take it, in order to examine into the question whether it was unlawfully imported (R. 11), and it is again specifically alleged that the said Leach brought the said articles of jewelry to Cleveland "with the consent of the said J. W. Friend" (R. 12).

In the face of these specific averments, which are admitted by the demurrer *pro hac vice*, it is evident that the question of the promises made to Larkin is, in any event, immaterial, even if they are not in effect traversed by the reply, since irrespective of this question it is admitted by the demurrer that Leach took the jewelry to Cleveland for examination with the specific consent of Friend,

the pledgee of the jewelry, and the real party in interest.

The case therefore presents squarely the question whether a collector, who finds property which he suspects has been smuggled, can lawfully take it into his possession with the consent of the owner, without seizure, for the preliminary purpose of taking it to another place for identification and ascertaining whether it was in fact smuggled, and may subsequently seize it upon becoming satisfied that it was smuggled, or whether the simple fact that it was first taken into his possession for the purpose of examination merely constitutes such a seizure that it can not thereafter be seized by him at any later time or any different place.

Upon this point the Government earnestly insists that as it appears in this case, both from the plea and the reply, that no adverse claim of right was asserted on the part of the Government while the jewelry was in New York, and that it was first seized with the assertion of title on the part of the United States in Ohio, and that the collector there for the first time refused to restore its possession to the claimant, the seizure was there made and jurisdiction in an action of forfeiture there attached.

It is well settled under the authorities that to constitute a seizure of property by an officer for forfeiture there must be not merely a finding and taking into possession by the officer, but such tak-

ing into possession must be accompanied by a claim to its possession adverse to the owner and by the exercise of authority over it as an assertion of right on the part of the Government; that the mere finding of the property and taking of it into possession by an officer for the purpose of further examination to determine whether it is subject to forfeiture is not a seizure; and that in such case there is no seizure for forfeiture until the adverse claim of the Government is asserted.

The Josefa Segunda, 10 Wheat., 312, 325.
Four Packages v. *U. S.*, 97 U. S., 404.
Friedenstein v. *U. S.*, 125 U. S., 224.
The Missouri, 3 Ben., 508; Fed. Cas., 9, 652.
25 Amer. & Eng. Enc. Law, 2d ed., 253.
Customs Regulations, art. 1492.

The authoritative definitions of seizure clearly show that the mere finding or taking into possession without the assertion of an adverse claim on the part of the Government is not a seizure.

In *The Josefa Segunda*, 10 Wheat., 312, 325, in a proceeding against a vessel and the negroes taken on board of her under the slave trade act of March 3, 1807, in which it was held that the evidence did not show that there had been a valid seizure of the vessel by the revenue inspector Roberts, Mr. Justice Story, delivering the opinion, said:

> In respect to the claim of Mr. Roberts, we do not think that the evidence establishes that he ever made any valid seizure of the vessel. It is not sufficient that he

> intended to make one, or that, on some occasions, he expressed to third persons that he had so done. *There must be an open, visible possession claimed, and authority exercised, under a seizure. The parties must understand that they are dispossessed*, and that they are no longer at liberty to exercise any dominion on board of the ship. * * * But here, Mr. Roberts gave no notice of the seizure to the persons on board; he exercised no authority and claimed no possession. He had no force adequate to compel submission; and his appearance in the vessel gave no other character to him than that of an inspector, rightfully on board, in performance of his ordinary duties. To construe such an equivocal act as a seizure would be unsettling principles.

In the Customs Regulations a definition of seizure is given which follows exactly the definition as given by Mr. Justice Story in this case. In article 1492 it is said:

> To constitute a valid seizure there must be open, visible possession claimed, and authority exercised under the seizure.

In *The Saratoga*, (9 Fed., 322, 326), in which it was held that the word "seizure," as used in the act of February 8, 1881, embraced seizures by the marshal under legal processes for the enforcement of a penalty as well as seizures by revenue officers for the purposes of forfeiture, the court said:

> The seizure by a marshal for a penalty is as much a "seizure," both in the ordinary

> meaning of that word and in its legal sense, as a seizure by a revenue officer for the purpose of forfeiture. To seize is to "take hold of suddenly and forcibly; to take possession of by force." (Worcester's Dict.) * * * As respects the fact of seizure, it matters not by what legal officer or in what kind of a proceeding such forcible possession is taken. * * * Whether done by the one or by the other, the act of each, the seizure itself, the forcible taking possession, is precisely the same in both cases.

In *The Missouri*, (3 Ben., 508, Fed. Cas., 9, 652) it was said by Benedict, district judge:

> A seizure is an assertion of title in the Government, and the subsequent proceedings in court are proceedings to try the title so asserted.

In 25 Amer. and Eng. Enc. Law, second edition, 253, a seizure is thus defined:

> To seize is to take hold of suddenly and forcibly; to take possession of by force. In law seizure is the act of taking possession by virtue of an execution or legal authority.

In two of the cases above cited it was specifically held that merchandise is not seized for forfeiture when first found and taken into possession by the Government officers for purposes merely of further examination, but only, when, after such examination, the Government's claim is asserted.

In *Four Packages* v. *United States* (97 U. S., 404) an information had been filed in the Dis-

trict Court for the Southern District of New York against four packages of goods seized by the collector of customs at the port of New York on the ground that they had been unladen and delivered from the steamship within said port without a permit therefor. The proof showed that on the arrival of the steamer at the dock in Hoboken, N. J., in another district, these packages were unladen and delivered on the dock from the vessel, and were there found by the inspectors of customs, who opened two of the packages and examined them, and, finding that they contained dutiable goods not on the manifest, placed upon all of the four packages marks to show that they had not been passed, and sent them to Castle Garden for further inspection. On a writ of error to review a judgment of forfeiture rendered below—the first assignment of error in this court was that the seizure of the goods was not made within the jurisdiction of the District Court, it being insisted that the seizure was made in the district of New Jersey, where the customs officers took charge of the goods and deprived the claimants of their possession. The court said on this point:

> Much discussion of the first assignment of error is unnecessary, as it is clear that the seizure of the four packages was made at Castle Garden, where the goods were sent by the inspectors present on the wharf for final examination. Sufficient appears to show

> that the duties in such cases are never collected on the wharf; that the examination made is only for the purpose of passing the baggage which does not contain dutiable articles and that the baggage which does contain dutiable goods is uniformly sent to Castle Garden for the collection of the duties, or to be dealt with as the law directs. Suffice it to say that no seizure was made on the wharf where the goods were landed, and that the proceedings in sending the goods to the place where the seizure was made was in all respects correct and in accordance with the usage. (*The Propeller Commerce*, 1 Black, 574; 3 Greenl. Evid. (8th ed.), sec. 395; *The Slavers* (*Kate*), 2 Wall., 350.)
>
> *Due seizure was made in this case at Castle Garden*, and consequently the first assignment of errors must be overruled.

This case distinctly recognizes the general principle that goods subject to forfeiture are not necessarily seized when they are first taken into possession of customs officers, but that although first found and coming into such possession in one district they may be properly sent by the officers to another district for further examination before actual seizure, and that when thereafter seized in such other district the District Court therein has jurisdiction of the forfeiture proceedings.

The case of *Friedenstein* v. *United States* (125 U. S., 224, 229), is conclusive upon the question that the seizure of goods by an officer is not necessarily

made at the time when they are "found" by him and taken into his possession, but that when he merely suspects that they are subject to forfeiture and takes them into his possession for further investigation merely, they are not at that time seized. This was an information to condemn certain diamonds seized as forfeited under the customs revenue laws. On the trial the customs officer testified that he found the diamonds at a store at No. 66 Nassau street, with a Mrs. Sussman, to whose custody the diamonds had been intrusted by the claimant for sale; that he requested Mrs. Sussman to accompany him to the custom-house, as he wished to make some inquiries about the diamonds, and that if her explanation was satisfactory he did not intend to seize them; that after they arrived at the custom-house and before the package was opened a conversation took place between himself and Mrs. Sussman, which, over objection, he related; and that after the package had been opened and he was through with his investigation, the seizure was made at the custom-house. It was held that the trial court did not err in admitting the evidence of the statements made by Mrs. Sussman at the custom-house, or in permitting the custom-house officer to testify that although he took physical possession of the property at 66 Nassau street, he did not make the actual seizure until he made it at the custom-house after the con-

versations with her. Mr. Justice Blatchford, delivering the opinion of the court, said:

> *It is plain, on the testimony, that the goods were not seized for forfeiture until after the conversation, and that the seizure took place at the custom-house*, after the investigation and examination there, and did not take place at 66 Nassau street. (See *Four Packages* v. *United States*, 97 U. S., 404, 411.)
>
> * * * Under these circumstances Mrs. Sussman's declarations to Brackett in regard to the goods, while he was making an official investigation and examination as to whether they should be seized for forfeiture, were part of the res gestæ and admissible in evidence as against the person claiming to be the owner of the goods in a suit in rem for their forfeiture.

This case specifically recognizes the right of a customs officer, after finding suspected property, to take it into possession for further examination merely without making actual seizure until convinced it is subject to forfeiture.

Article 1494 of the Customs Regulations provides that—

> Collectors will be prompt to take the proper steps to enforce forfeitures and penalties, but will avoid involving the Government in litigation upon slight cause or mere suspicion.

This article was direct authority for the course pursued by the collector, who, on the facts stated in the Government's reply, appears to have very

properly refrained from seizing the property in New York, where its smuggling was merely suspected, and to have postponed its seizure until after the property had been taken to Ohio and so identified as smuggled property as to justify its seizure, the propriety of this course being emphasized by the fact, which appears from the intervenor's plea as well as from the Government's reply, that after the investigation in Ohio had shown that part of the jewelry which Leach had taken there had not been unlawfully imported, such portion of the jewelry was returned to the intervenor in New York and unnecessary litigation and annoyance to the inpledgee in respect to such jewelry thereby obviated. (Plea, R., 7; reply, R., 12.)

Therefore, as the intervenor did not see proper in the court below to file a rejoinder and put in issue the facts alleged in the Government's reply, but by demurring thereto admitted its truth for the purpose of the hearing, and as this reply specifically and unequivocally avers that the jewelry was taken to Ohio for examination with the express consent of J. W. Friend, the real claimant thereto, and that after investigation there it was seized and title claimed for the United States in Cleveland, Ohio (R., 12), it is respectfully submitted that under the doctrine of the *Four Packages* case and *Friedenstein* v. *United States* and the other authorities hereinabove cited, jurisdiction to

enforce its forfeiture was conferred by such seizure upon the District Court in Ohio, and that the demurrer to the Government's reply should have been overruled and the case proceeded with to a hearing on the merits.

Respectfully submitted.

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EDWARD T. SANFORD,
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No. 356.

United States Supreme Court.

October Term, 1907.

No. 356.

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THE UNITED STATES,
PLAINTIFF IN ERROR,

vs.

ADRIAN H. LARKIN, INTERVENOR AND CLAIMANT, ETC.,
DEFENDANT IN ERROR.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

HOYT, DUSTIN & KELLEY,
Solicitors for Adrian H. Larkin.
A. S. DUSTIN, of Counsel.

Supreme Court of The United States, October Term, 1907.

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DEFENDANT IN ERROR.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

HOYT, DUSTIN & KELLEY,
Solicitors for Adrian H. Larkin.

A. C. DUSTIN, of Counsel.

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The Gates Legal Publishing Co.,
Cleveland, Ohio.

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DEFENDANT IN ERROR.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

Motion has been made by defendant in error to dismiss the writ of error herein for want of jurisdiction—first, because no proper certificate of the question of jurisdiction was granted during the term of court at which the judgment was entered; second, because this case is not one where the jurisdiction of the court below was in issue within the meaning of the Judiciary Act, and there is coupled with the motion to dismiss, a motion to affirm the judgment of the lower court should this Court be of the opinion that it has jurisdiction of the case.

This proceeding in error is brought here direct from the District Court for the Northern District of Ohio under Section 5 of the Judiciary Act of March 3, 1891, providing that appeals or writs of error may be taken direct from the

Circuit and District Courts to the Supreme Court,

> "in any case in which the jurisdiction of the court is is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

On June 8, 1905, John J. Sullivan, United States Attorney for the Northern District of Ohio, filed an information or complaint on behalf of the United States in the District Court for the Northern District of Ohio for the forfeiture of certain jewels which the complaint set forth had been fraudulently imported into the United States without the payment of duty, and that on May 19, 1905, the jewels so smuggled had been seized by Charles F. Leach, Collector of the Northern District of Ohio, within said District. On July 7, 1905, Adrian H. Larkin, being interested as a claimant, came in and entering his appearance specially, filed his plea therein to the jurisdiction of the court below to adjudicate the forfeiture of said jewels. To this plea, a demurrer was filed, which, upon argument was overruled (Record, pages 9 and 10). A reply to the plea was then filed, and to this reply the claimant demurred This demurrer was sustained (Record, pages 13 and 14). The Government declining to amend its reply or further plead, the court sustained the plea and dismissed the information. No opinion was filed by the District Judge on overruling the demurrer by the United States to the plea (Record, page 10), but the District Judge did file an opinion setting forth his reasons and the grounds for sustaining Larkin's demurrer to the reply (Record, pages 13 and 14). Exception was noted by the United States Attorney to the action of the court without any expression of the grounds thereof, and no grounds were set forth in the judgment of dismissal (see Record, page 14). The United States on July 19, 1906, petitioned for an appeal to the *United States Circuit Court of Appeals;* obtained an order allowing *such appeal*, and filed its assignment of errors. The appeal was perfected in the United States Circuit Court of Appeals, and on May 7, 1907, a judg-

ment or mandate was entered affirming the decision of the United States District Court (see journal entries, printed Record, pages 18 and 19). Larkin filed on May 7, 1907, an application for an orderof the court for a delivery to him of the property seized. While this was under advisement, the United States, on May 21, 1907, petitioned the court for a writ of error to the United States Supreme Court. On the same date, May 21, 1907, an order was granted, allowing the writ of error, and a certificate obtained, certifying the jurisdictional questions. It will be noted that the precipe (copy of which is to be found in the printed Record, page 20), did not call for a copy of the original petition for appeal to the United States Circuit Court of Appeals, nor the assignment of errors, nor the mandate, nor opinion of the Circuit Court of Appeals, and while the journal entries on pages 18 and 19 show that such proceedings in error were taken and judgment affirmed on error the complete papers are not incorporated as a part of the transcript or printed Record in this case.

The Argument.

I.

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THIS ACTION FOR WANT OF A PROPER CERTIFICATE OF THE ISSUE OF JURISDICTION IN THE COURT BELOW.

By Act of Congress, July 27, 1882, c. 351, 22 Stat. L. 176, the terms of the Circuit and District Courts in the Northern District of Ohio begin on the first Tuesday of February, April and October of each year. The judgment was entered in the District Court below on May 22, 1906, at the April (1906) term of that court, while the application for a writ of

error to this court and the certificate of the question of jurisdiction was entered on May 21, 1907, at the April (1907) term of the court. Two terms of court, therefore (the October Term, 1906, and February Term, 1907), intervened between the entry of the judgment and the certificate.

The first branch of the motion to dismiss should, therefore, be granted, as the certificate of the question of jurisdiction should have been made at the same term as the judgment.

Colvin vs. Jacksonville, 158 U. S. 456;
The Bayonne, 159 U. S. 687;
Merritt vs. Bowdoin College, 169 U. S., 551;
Chappell vs. U. S., 160 U. S. 499;
Davis vs. Geissler, 162 U. S. 299.

The certificate is jurisdictional to a review of the case by this court.

Maynard vs. Hecht, 151 U. S. 324;
Colvin vs. Jacksonville, 157 U. S. 368;
Davis vs. Geissler, 162 U. S. 299.

The certificate of jurisdiction, the petition for writ of error to this Court, the allowance of the writ of error, and the assignment of errors (see Record, pages 15, 16 and 17), comply with the requirements of the statute as to form, but having come too late must be disregarded, and if the jurisdiction of this court is to be maintained, it must be because the original judgment entered herein by the court below on May 22, 1906, contained language sufficient to comply with the statute as to a certificate of the question of jurisdiction. If it did, then the writ of error might be taken at any time within two years.

Excelsior W. P. Co. vs. Bridge Co., 185 U. S. 285.

In this case the court said:

"It must appear * * *either that the question of jurisdiction was certified to this court or that the *decree* appealed from shows upon its *face* that the sole question decided was one of jurisdiction."

The Record also should show an intention to appeal to the Supreme Court on the ground of jurisdiction (*The Bayonne*, 159 U. S. 687). The decree entered below (Record, page 14) does not contain the word "jurisdiction" nor "certificate," and while the United States caused an exception to be noted, it did not indicate the ground thereof, nor did it indicate anywhere *any intention to appeal to the Supreme Court.* On the contrary, the journal entries show that the United States took an appeal to the Circuit Court of Appeals and had the case there disposed of. The grounds of appeal to the Circuit Court of Appeals do not appear.

While by searching the Record in this case the Court would find that on the facts set forth in the pleadings and the opinion of the court that the case was disposed of below on the ground that no lawful seizure could be made in that district (whether that constitutes jurisdiction will be argued under the next head), yet the court will not search the Record. As is said by Brown, Justice, in *Van Wagenen vs. Sewall*, 160 U. S. 373:

> "Indeed, it appears to have been the very object of the fifth section of the Act of 1891 to have the question of jurisdiction plainly and distinctly certified to us, or at least to have it appear so clearly in the *decree* of the court below that no other question was involved, *that no further examination of the Record would be necessary.*"

The decisions of this Court clearly require the question of jurisdiction to affirmatively appear. Where several questions are presented to the court below the sole question of jurisdiction must be certified with great particularity; where there is in reality only one question, and that one of jurisdiction, it must be made to appear, in the absence of a formal certificate from the decree itself without searching the Record that the court below decided the case on that ground and that alone.

Van Wagenen vs. Sewall, 160 U. S. 373;

In re Lehigh Min. Co., 156 U. S. 322;
Shields vs. Coleman, 157 U. S. 168;
Construction Co. vs. Gibney, 160 U. S. 217;
Chappell vs. U. S., 160 U. S. 499;
Pipe Co. vs. Bridge Co., 185 U. S. 285.

II.

THIS CASE IS NOT ONE WHERE THE JURISDICTION OF THE COURT BELOW WAS IN ISSUE WITHIN THE MEANING OF SECTION 5 OF THE JUDICIARY ACT.

Counsel for the United States were evidently of the opinion that the Circuit Court of Appeals for the Sixth Circuit, and not this Court, was the proper court to review the judgment of the District Court. If the sole question below was one of jurisdiction, and such as is jurisdictional within the meaning of the Act, it is at the best doubtful if the Circuit Court of Appeals had jurisdiction at all, and the proceedings taken in that court were probably a nullity.

U. S. vs. Jahn, 155 U. S. 109;
In re Aspinwell, 90 Fed. Rep., 675;
Sun Printing Co. vs. Edwards, 121 Fed. Rep., 826;
Pipe Co. vs. Bridge Co., 109 Fed. Rep. 497; same case 185 U. S. 282.

What constitutes jurisdiction from which appeal or error will lie directly to the Supreme Court has been repeatedly before this Court for decision.

Louisville Trust Co. v. Knott, 191 U. S. 225;
Mexican Central Ry. Co. v. Eckman, 187 U. S. 432;
Smith v. McKay, 161 U. S. 355;
Blythe v. Hinckley, 173 U. S. 501.

As is said in the syllabus of *Louisville Trust Company v. Knott*:

> "The question of jurisdiction which the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 836, permits to be certified directly to this court must be one involving the jurisdiction of the Circuit Court as a Federal Court."

There being no formal certificate of the question of jurisdiction made at the term of court when judgment was entered, we assume under this branch of the motion that the original judgment of dismissal sufficiently shows that question and we shall now examine the Record to see what question of jurisdiction was before the court below.

The Record is made up of the complaint, plea, reply, the two demurrers, the opinion of Judge Tayler, and the judgment of dismissal.

The complaint set forth the fact of the smuggling of the goods, the finding and seizure of them by the Collector in Cleveland, Ohio, and prayed a decree of forfeiture and sale.

The plea filed by Larkin (see Record, pages 6, 7 and 8) was in the nature of a confession and avoidance. It assumed the smuggling of the goods but set forth certain facts and circumstances to the effect that these goods were in New York City in Larkin's possession, and that the Treasurer of the United States had been fully informed thereof, and that Mr. Leach, the Collector of Cleveland, claiming to represent the Treasury Department for that purpose came to New York to inspect the jewelry, and that at Leach's request, the jewels were placed in his temporary custody for submission to an expert, Leach executing a receipt, particularly specifying that they were received by him for examination and identification, and that without the knowledge or consent of Larkin, the custodian of the jewels, they were taken away from New York by Mr. Leach and brought to Cleveland, Ohio, and that later he went through the form of seizing them in Cleveland, and then stated that if the goods were subject to seizure any place, they should have been seized in New York and not in Cleveland, they having come into

the custody of the Collector in the former place. The demurrer to this plea was overruled.

The reply filed by the United States (see Record, pages 10, 11 and 12), sets up the facts in somewhat different, although not materially different form.

Under the Statutes of the United States suits for forfeiture of smuggled property must be instituted in the district where the goods are *found and seized*, and the sole question presented to the District Court below was whether a seizure had been made in Cleveland. If the goods could be lawfully seized and had been lawfully seized in Cleveland, then this particular District Court had jurisdiction to decree the forfeiture. If, however, a state of facts existed where they could not be lawfully seized in Cleveland, then this particular court was without jurisdiction to decree a forfeiture, and the complaint must be dismissed.

When we examine Judge Tayler's opinion (Record, pages 13-14) we find that he decided the case solely on the venue of seizure. He said:

> "Considering the circumstances under which the Collector of Customs obtained possession of the articles of jewelry which are the subject of this action, as shown by the statement of facts, and especially by the receipt which the Collector gave for them, it is quite apparent that no seizure of them could be made in this district."

Being of the opinion that no lawful seizure could be made of these goods within his district, he dimissed the complaint.

The question whether certain goods are smuggled; whether under the facts of a particular case such goods are liable to seizure in a particular district and what steps amount to a seizure thereof, are proper subjects for the determination of the District Court and were clearly within its jurisdiction as a Federal Court, and when the District Court below held that under the facts of this case "No seizure could be made in this district" *it exercised jurisdiction to adjudicate*

that question, but it denied the right of the United States District Court at Cleveland to try the question of the forfeiture of the goods, because no lawful seizure had been made in that district. The Circuit Court of Appeals for the Sixth Circuit in their opinion hereafter referred to as Exhibit A used the following language:

> "We quite agree with the court below that under the circumstances of this case these jewels were not subject to seizure in Cleveland but should have been seized in the district of New York. The articles were found in the latter district and should have been there seized."

Later along in the same opinion the same court said:

> "These articles were found in the Southern District of New York. If, as now claimed, the Collector for the Northern District of Ohio had authority to seize them wherever found he should have seized them, where in fact, he found them, and then placed them in the custody of the Collector of the port of New York to hold until adjudication * * * that he took them to his own district in order to determine whether they were subject to seizure cannot affect the question of jurisdiction. They had been found in New York and should have been seized there."

Suppose a case where a defendant is induced by fraud to come within the jurisdiction of a state court, or is present in attendance on some law suit, or under such other circumstances as the law recognizes him as privileged from being sued; or suppose property of the defendant is brought within the jurisdiction of the state court by fraud and then attached; or suppose a case, as in Ohio, where the defendant may be served with summons by leaving a copy at his usual place of residence, and such service is reported by the sheriff and the defendant in fact has given up his residence and moved his family away. Suppose that in any one of the above mentioned cases (the citizenship being proper for that purpose), the defendant saving his appearance in the proper way, should remove the case to the Federal Court, and then move to quash

the summons or set aside the attachment, the judgment of the court thereon would involve the question of jurisdiction. That is to say, the court would proceed to hear the case on the merits, or dismiss the case for want of jurisdiction accordingly, as it determined the merits of the motion; but its action in the premises would not involve its jurisdiction "as a federal court" within the meaning of the statute, but rather its general jurisdiction as a court of law or equity, as the case might be. In other words, the question decided in such a case is one of general law whether the defendant or his property is properly before the court.

This preliminary question being decided, as a mere incident, the court dismisses the case or sustains its jurisdiction to proceed. In all such cases the Circuit Court of Appeals, and not this Court, is given jurisdiction, as the question involved is not the jurisdiction of the lower court "as a federal court."

The case at bar is similar in principle. The only court which has jurisdiction to adjudicate a forfeiture of smuggled goods is the Federal District Court (R. S. U. S. Section 563, paragraph 3), but such adjudication must be had in the district of seizure.

Proceedings for forfeiture are in the nature of an information or complaint *in rem* against the goods themselves, upon which a monition in the nature of an attachment issues, and the so-called plea to the jurisdiction filed in the court below is analogous to the motion to quash the summons or set aside the attachment in the supposed cases. Perhaps a motion to quash or set aside the monition might have been filed in this case, but as Larkin was not a party to the Record, the plea to the jurisdiction bringing him onto the Record, and setting up the facts showing that the monition should not issue, was clearly the most appropriate way of raising the question. The demurrer was decided upon general principles of law, to-wit: that the facts in this case were such that no

seizure could be lawfully made in the Cleveland District. The court having so found, dismissed the case. The venue or proper place for seizure was the real issue determined by the court below, and not its jurisdiction as a federal court. This fact affirmatively appears by the opinion of the District Judge hereinbefore quoted, as well as the opinion of the Circuit Court of Appeals heretofore quoted from.

We contend, therefore, that the jurisdiction of the court was not in issue within the meaning of the Judiciary Act of March 3, 1891, and we submit that this motion to dismiss the petition in error should be granted.

In this connection perhaps it is not out of place to call the Court's attention to Sections 1000, 1001 and 1010 and the rules of this Court in relation to the damages sustained by the claimant Larkin. It will be noted that the petition for writ of error (see Record, top of page 16), specially asked the court below to have the writ of error operate as a supersedeas, and that the order of the court (see Record, middle page 17), contained the order that the said writ of error should operate as a supersedeas.

The object and purpose of the plea being to recover possession and custody of the jewels seized in this case, and the claimant Larkin having been kept out of possession, the damages to which he is justly entitled is six per cent upon the fair value of said jewels during the time that has elapsed since the unlawful seizure, and we respectfully ask the Court to make the appropriate order in this case in the mandate to the District Court to ascertain such fair value and allow to the claimant in this case interest thereon.

Schell vs. Cochran, 107 U. S. 625.

III.

If, however, the Court should be of the opinion that the question of jurisdiction before the court below can be reviewed in this Court, we submit that the questions arising on the Record are so frivolous as not to need further argument.

First—So long as the only question that can be considered by this Court is the question of jurisdiction, it becomes important to determine whether the real merits of this controversy are before this Court. Nobody contends or has contended that the Federal District Court is not the proper court to adjudicate on the question of forfeiture, but to make a case within its jurisdiction, there must be a seizure of goods within the district. The District Court in this case held as appears from the Record that there was no seizure in the Cleveland district and dismissed the complaint for that reason. That question was submitted on error to the Circuit Court of Appeals for the Sixth Circuit and the judgment of the District Court affirmed. See opinion of Circuit Court of Appeals (Exhibit A, hereto.) The question, therefore, of the right of the Collector to seize these particular goods in Cleveland has been finally determined, and whether determined rightfully or wrongfully, is not, as it seems to us, before this Court.

Second—On the assumption, however, that the Court may hold contrary to our contention, I beg leave to submit in support of the motion to affirm, a statement and brief on the merits.

THE FACTS.

An information was on June 8, 1905, filed in the District Court of the United States for the Northern District of Ohio by John J. Sullivan, District Attorney, to obtain the forfeiture of certain jewels alleged to have been brought into

the United States, through the port of New York, without payment of duty, by one Cassie L. Chadwick on the 10th day of June, 1902.

Adrian H. Larkin, claimant, appearing specially, filed his plea, setting forth in substance that one J. W. Friend, having in his possession in the city of New York, for a long time prior to the 14th day of March, 1905, certain precious stones and jewelry, which had been pledged with him as collateral security for money loaned by him to one Cassie L. Chadwick,—learning that the Secretary of the Treasury of the United States, or certain officials of the Treasury Department, were making claims that Cassie L. Chadwick had brought into the United States, through the port of New York, from foreign countries, a large amount of jewelry and precious stones, without the payment of lawful duty,—visited the Secretary of the Treasury at his office in Washington, D. C., and informed him of the property which he (Friend) held in New York City, and made full disclosure to him of that property and the circumstances under which it came into his possession, and agreed with the Secretary of the Treasury that he would keep the property in New York City subject to inspection and examination of any official of the Treasury Department.

That a short time after that Friend delivered this property into the custody of the claimant, Adrian H. Larkin, as bailee, with authority to conduct any business necessary to be conducted with the Treasury Department at Washington in relation to that property for the purpose of ascertaining if any of it had been wrongfully imported into the United States.

That Larkin had his office in the City of New York and kept the property at his office until it was wrongfully removed in the manner set forth in the plea. That on the 14th day of March, 1905, about ten o'clock in the forenoon, Charles F. Leach, the Collector of Customs for the Collection District of Cuyahoga County, Ohio, pretending to represent the

Secretary of the Treasury of the United States came to Larkin's office and asked to see and was shown the property mentioned. That Leach stated to Larkin that some of the property had not been imported and that he did not care to make further examination of that, but there were certain pieces of jewelry he was in doubt about, and that he would like to exhibit them to a person located in New York City who was expert in such matters and asked permission to take the jewelry away from Larkin's office for that purpose, he promising to return it to Larkin on that same afternoon. That Larkin, relying on the promise of Leach delivered the said jewelry to him, receiving from Leach a receipt therefor in writing reading as follows:

> "New York, March 14, 1905.
>
> "Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry for examination and identification." (Here follows a description of the property.)
>
> "CHARLES F. LEACH,
> "Collector of Customs."

The plea then avers that in violation of his promise and agreement and without permission of Larkin or Friend, after the receipt by him of that propery, Leach, on March 14, 1905, proceeded to and did approprite the property in the receipt described, and in further violation of his promise and agreement shipped and expressed the same to himself in the city of Cleveland, Ohio. That subsequently certain pieces of the jewelry, which are described in Exhibit B, attached to and made part of the plea, were returned to Larkin, but that the balance had been kept by Leach and retained in his possession ever since the 14th day of March, 1905, and that Leach still wrongfully held possession of the same in the city of Cleveland and refused to return the same to Larkin in the city of New York or to the Collector of the port of New York.

The plea further alleges that the conduct of Leach amounted to a seizure by him of the property in New York

or else that it was wrongfully and fraudulently removed by him from the District of New York to the County of Cuyahoga in order that he might pretend to seize it in this District and prosecute forfeiture proceedings in Cleveland instead of in New York City where the property was located when it came into Leach's possession and where it was subject to seizure and proceedings for forfeiture if it was liable thereto, and the claimant protesting that the court was without jurisdiction, prayed judgment of the court whether any further answer or plea should be made in this case, and that the proceedings should be quashed and the information dismissed.

To this plea the District Attorney filed a demurrer which was argued and overruled by the court. No written opinion was filed by the court. Thereupon the Government took leave to reply and thereafter filed a reply where the facts are set forth somewhat differently from the facts set forth in the plea.

It is claimed in this reply that Leach met Friend at the office of the Secretary of the Treasury in Washington, and that Friend said to him there that he could come to New York and get the articles and ascertain which of the articles, if any, had been unlawfully imported, and that if necessary, for ascertaining whether they had been unlawfully imported, that they might be taken to Cleveland, Ohio, or wherever Leach might deem it necessary to take them in order to examine into the question whether or not they were unlawfully imported, and that Friend informed him that he was willing and desirous of paying the duty on such of the articles as had been unlawfully imported into the United States.

The reply then further states that Leach went to the city of New York on the 14th day of March, 1905, and went to Larkin's office where the jewelry and merchandise were exhibited to him; that Leach informed Larkin that he was in doubt as to what specific articles of jewelry and merchandise were unlawfully imported and that it would be necessary for

him

> "to take such articles as to which he was in doubt and further examine them as to whether or not they had been unlawfully imported, and thereupon the said Charles F. Leach received into his care certain of the said articles of jewelry and merchandise and gave to the said Adrian H. Larkin a receipt, copy of which is set forth in the plea to the jurisdiction herein filed."

It will be noted that the reply does not claim that Leach informed Larkin that he intended to take the jewels to Cleveland. The reply does state that the only place that Leach could get positive information on the subject of whether these jewels had been unlawfully imported was in the city of Cleveland, and the reply avers that with the consent of Friend he brought them to Cleveland; this consent evidently, however, refers back to the talk between Leach and Friend in Washington some time before this.

The reply then goes on to state that Leach brought the jewels and merchandise to Cleveland; that he made a careful investigation there and having ascertained that certain of these articles had been unlawfully imported, he proceeded to seize them in the city of Cleveland, Ohio, on the 19th day of May, 1905.

To this reply Larkin interposed a demurrer, which came on for hearing before the Honorable R. W. Tayler and was sustained. Judge Tayler's opinion can be found at the bottom of page 13 and top of 14 of the printed Record. The United States in open court waiving its right to amend its reply and refusing to plead, further judgment was entered dismissing the action (Record, page 14).

The Argument.

The plea and the reply thereto raised an issue of fact as to the motive of Collector Leach in getting into his possession in New York City the jewelry in question and his conduct and purpose in surreptitiously removing it from New York to the city of Cleveland, but as the case was disposed of

below by the court on the demurrer to the reply, the averments of fact in the reply must probably be accepted as true for the purpose of this hearing.

On close examination it will be noticed that substantially all the averments of the plea are admitted by the reply. The plea averred that Leach promised Larkin that he would return the jewelry back into Larkin's possession the afternoon of the 14th. The reply does not in terms deny this fact. The language of the reply is denial

> "that the said Charles F. Leach, Collector * * * promised * * * that he would *immediately* return the said articles of jewelry."

The averment that the jewelry was to be returned on the afternoon of the 14th is hardly met by the denial that it was to be "immediately" returned. The plea avers that Leach stated he was in doubt about certain articles and would like to get the opinion of an expert in New York City, and asked permission to take them away for that purpose. The reply denies that he took them into custody merely to submit them to an expert and avers that Leach removed the jewels to Cleveland with Friend's permission. This averment of Friend's permission as heretofore stated evidently refers back to the statement made by Friend in Washington some time previous that the property would be turned over to the Government in New York City for investigation. It will be noted that the reply nowhere avers that Leach informed Larkin that he intended to remove the jewels from New York, and the receipt which Leach gave to Larkin clearly indicated the contrary. Under the terms of that receipt the jewelry came into Leach's possession in New York for one specific purpose only, to-wit: for examination and identification. Leach did not receive into his custody this jewelry by reason of any arrangement made with Friend. His contract was made with Larkin, and is embodied in the written receipt before mentioned. The law would imply from the language of that receipt the promise of Leach to return the jewelry to Larkin after his examination

was completed. If Leach's examination resulted in convincing him that the goods were unlawfully imported he could have returned them to Larkin and then seized them, or perhaps he might have been justified in returning them to the Collector of the Port of New York, giving to the Collector there the information for making the necessary seizure, but common honesty will not permit the United States Government through its Collector to remove property, voluntarily delivered to the Collector, from one district to another, and then permit the seizure of such property in the latter district, and the courts will not sanction such a trick. Larkin in his plea says Leach got possession of the jewels under the representation that he wished to submit them to an expert in New York for examination and promised to return them the same afternoon. Leach says he did not agree to return them immediately. If Larkin is right, Leach's action in sending the jewels to Cleveland was grossly fraudulent, and if Leach is right, his obligation to return the jewelry to Larkin is none the less strong, but that arrangement might justify some delay in returning them to Larkin. In any event, Leach's receipt would obligate him to return them within a reasonable time. There are two views to take of the facts set forth. Either Leach acted in good faith and honestly under the supposed authority granted to him by the claimant in sending the goods to Cleveland for further examination,—in which event it was his duty to return them when the examination was completed; or else he wrongfully removed them from the city of New York, in which his very act would probably amount to a seizure. Either situation was fatal to the jurisdiction of the court below.

Somewhat analogous to the situation here are the cases which have been frequently before the courts where parties by trick or device brought property of non-residents within the jurisdiction of the court and there attempted to seize it. That this cannot be done is clearly pointed out in the case of *Kizer v. George et al.*, reported in the 19th *Weekly Law Bulletin*, page 257. The opinion in this case cites the decisions of

many courts to the same effect.

Garland & Ralston, in Volume 1 of their work on *Federal Practice,* Sec. 145, page 184, in speaking of the same general subject, used the following language:

> "Nor could a party be said to be found within the district, or properly served there, who had been inveigled into it, for the purpose of making service there, by the false representations or deceitful contrivances of the plaintiff, or who was there merely to attend the trial of a case to which he was a party or to plead to an indictment against him." (Citing many cases.)

To state it broadly, a party will never be permitted by a court to take advantage of his own wrong, and the United States Government will not be permitted to take advantage of its Collector's act in the case at bar. If the facts as set forth in the plea filed by Larkin are correct, either Leach wrongfully appropriated this property in New York or exercised such authority over it as would make his acts in law a seizure there. If, however, Leach's position set up in his reply is correct, then taken in connection with the receipt which he gave, *the property was constructively always in the possession of the Government under the terms of that receipt, and the obligation rested on the Government to return that property to New York.* It could not lawfully seize it any place else. Being brought to Cleveland by the Government Collector, no forfeiture was committed in Cleveland and the property was not found there within the meaning of the revenue laws.

We have examined the statutes and the decisions of the the federal courts with reference to the place of seizure of property and the prosecution of suits to forfeit the same, but do not find anything exactly in point. However, when the statutes and the decisions are considered with a view to determine the principle and reason of the law, the conclusion is clear. The statutes of the United States authorizing the for-

feiture of goods are highly penal and are to be strictly construed.

U. S. vs. Eighty-four Boxes of Sugar, 7 Peters, 453:

U. S. vs. Celluloid, 82 Fed. Rep., 627 (see particularly opinion of Judge Lurton).

The statutes being penal in their nature, it is incumbent upon the Government to find some statute justifying the proceedings which it adopted in this case. Not only has the Government failed to produce any statute justifying its course, but reason and simple justice are all against the Government. The custom laws contemplate severe penalties for their evasion. Not only is the person who unlawfully imports goods subject to punishment and fine for his wrongful act, but the goods themselves are subject to forfeiture, and the statutes make it the duty of any person who comes into the possession of goods, which he has reason to believe may have been unlawfully imported, to disclose such facts to the proper officials of the Government, failing to do which, makes him liable to the same penalties as the original wrongdoer.

R. S., Section 3082.

Of the two proceedings provided for by the Statute for punishment of offenses against the revenue laws, one is an action against the person—an action *in personam*, the other an action against the goods for forfeiture—an action *in rem*.

The venue of these two proceedings is clearly deducible from the statutes. The man committing the fault can be proceeded against *in personam* in the district where he committed the offense. The goods can be proceeded against *in rem* in the district where the forfeiture is committed, and a forfeiture is committed where they are found.

There is no suggestion in the statutes that an officer of the Government can take possession of the goods in one district and carry them into another district and there seize them. While the statutes impose severe penalties for a violation of the revenue laws, they as plainly recognize the rights of the

claimants of property to their day in court, before goods can be condemned for forfeiture, and the place where the goods are proceeded against must be determined by the place where they come into the custody of the Government and are lawfully seized.

If the contention of the Government in the case at bar were right, Mr. Leach could have brought the twelve or fifteen pieces of jewelry to Cleveland; then have taken one of them to California and seized that piece there; another one to St. Louis and seized that piece there and so on.

In fact, he could have made as many seizures in as many districts as there were pieces of jewelry.

Certainly the revenue laws of the United States do not permit any such conduct.

The venue for the seizure and proceedings for forfeiture are to be determined by the place where the goods came into the possession of the Government, and in the case at bar these goods came into the possession of the Government in New York City. If they were removed from New York City, it was solely for the purpose of investigation. Constructively in the eye of the law they were still in New York.

Section 3072 permits collectors, and in fact makes it their duty, to perform their duties any place where they may happen to be, and Collector Leach could perhaps have lawfully seized these goods in New York, and he could have lawfully seized these goods in Cleveland, *had he found them in Cleveland*, but to say that he could himself remove them surreptitiously and dishonestly from New York City to the city of Cleveland and then *find them* in Cleveland within the meaning of the law, and seize them there, would be a monstrous proposition, and to say that he could bring them to Cleveland *with the assent of the claimant for the sole purpose of investigation and then seize them there on the theory that he found them there* would permit him to commit a fraud upon the claimant of the property.

As above stated, it is made the duty by Section 3082 of the statutes of the United States for Mr. Friend or Mr. Larkin to disclose their possession of this jewelry to the Government officials. They did disclose it. They acted with the most perfect honesty in the transaction, and when Mr. Leach came to New York they freely exhibited to him the jewelry in order that he might determine whether any of it had been unlawfully imported. Clearly Mr. Larkin or Mr. Friend, if their information was different from Mr. Leach's and they disagreed with him as to whether these articles were unlawfully imported, had the right to have the question of forfeiture tried in New York City where the goods then were located.

The statutes in relation to the subject of seizure and forfeiture all plainly contemplate that the venue for seizure shall be where the goods come into the custody of the Government, and that the venue for proceedings for forfeiture shall be in the District Court at the same place. The sections of the United States statutes bearing on this case are the following:

Sections 3072, 3082, 3083, 3084, 3085, 838, 3086, 3087.

See also

Act of June 10, 1890 C., 407, Sec. 21.
Sec. 563, paragraphs third and eighth.
Sections 730-734, 564, 919.

Not only would it be possible for a dishonest collector to so conduct himself by carrying goods from one district to another so as to make it a practical denial of justice to the claimant interested in the property, but if the collector were permitted to remove property from one district to another at his own sweet will, we would no doubt have the spectacle of collectors from all parts of the United States taking station at the ports of entry to the neglect of the business in their own districts, and watching for opportunities to get goods into their possession by hook or crook in order that they might move them into their own home district and there seize them

and obtain the reward of their pernicious activity. The law does not contemplate any such thing and the courts will not sustain such acts.

It should be noted in passing that the statutes above cited not only provide for seizures on land but also seizures on the high seas, and it is to be noticed how the venue in the two classes of cases is provided for.

Where seizure is made on the high seas the venue for prosecution is fixed at the first port to which the vessel or property is brought. While if the seizure is made on land the venue is fixed at the district of seizure. Some places the words are used, "where the forfeiture is committed." This language is used advisedly as in proceedings *in rem* to forfeit property, the forfeiture is committed by the goods themselves. The property itself is regarded as the real culprit, and where the property is found fixes the venue of the offense for purposes of forfeiture.

There are two cases in the Federal Courts which throw some light on this subject.

The first is *The Abby*, reported in First Mason, 360. The first paragraph of the syllabus of this case reads as follows:

> "When the seizure is made within the limits of a judicial district the district court of that district has exclusive original cognizance thereof. And if brought into another district, the Court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any district court into which the property is brought."

The other case is *Four Packages against The United States*, reported in 97 United States, 404. The facts in this case were as follows:

Two parties, residents and in business in New York City, went to Germany, having in contemplation on their return the establishment of a partnership in carrying on the business of hair-dressing. They brought back with them four

packages of human hair as a part of their personal baggage to America. The steamer on which they sailed went to her regular dock or port at Hoboken, N. J., at which place the vessel was supposed to discharge her passengers with their personal baggage, which was not subject to duty. Upon the supposition that the packages belonging to these two men was their personal baggage, it was put over the side of the vessel and on the dock, but upon a casual examination of it by the inspectors they refused to pass it as personal baggage. It was then put back on board the vessel and landed at Castle Garden. No permit had been issued to land these goods, and they had never been entered until they were put on the dock at Castle Garden for regular entry into the United States. At this place they were seized by the Customs Officers and proceedings were instituted in New York to forfeit the goods. The Court apparently concede that if these goods had been landed in New Jersey, then that the New York court would have been without jurisdiction, but they found under the state of facts, part of which I have recited above, that the goods were not in fact landed in New Jersey but that they were entered in New York and, therefore, *were subject to seizure there.*

The Court say in this case, page 412:

> "* * * it is too clear for argument that neither of the exhibits offered in evidence was a permit for landing and delivering any package which contained dutiable merchandise. * * *; but it is wholly immaterial whether the inspectors were present or absent at the moment the packages were landed from the steamer (in New Jersey) as it clearly appears that as soon as the inspectors discovered that the packages contained dutiable merchandise, they ordered the same to be sent to the proper place for further inspection. Taken as a whole the evidence fully proved that the packages were unladen and delivered without the permit required by the act of Congress."

That is, they were not in law landed in New Jersey.

While this case does not distinctly decide the question we are arguing here, it is on principle a strong case in our favor. It recognized that in order to prosecute an action to forfeit goods there must be two things: (1) an actual seizure of the goods by the Collector, and (2) a seizure by the Collector at the proper place. They hold in that case that the goods never having been landed in the State of New Jersey, and being put back on the vessel without any landing, came properly into the port at New York and that the port of New York was, therefore, the proper place for seizure. As before stated, it was apparently conceded by the Court throughout this case that if the goods had been actually landed in New Jersey the seizure must have been made and the forfeiture proceedings prosecuted there.

Applying the principles of this case to the case at bar, the pretended seizure by Collector Leach as set forth in his reply, was made in Cleveland, but could he lawfully, under the facts in this case, make the seizure in Cleveland?

As we have heretofore pointed out, these goods came into his possession in New York City. Either his removal of these goods to Cleveland was wrongful and amounted to a seizure in New York, or else it was rightful with the consent of the claimant under the promises clearly implied in the receipt to return them to New York when his examination was complete. In either case the only place that these goods could be lawfully seized was in New York, where they first came into custody of the Government.

Respectfully submitted,
HOYT, DUSTIN & KELLEY,
Solicitors for Adrian H. Larkin.

A. C. DUSTIN of Counsel.

EXHIBIT A.

No. 1595.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT.

UNITED STATES OF AMERICA

vs.

ADRIAN H. LARKIN, CLAIMANT OF CERTAIN JEWELRY.

Appeal from the District Court of the United States for the Northern District of Ohio.

Submitted March 6, 1907.
Decided April 2, 1907.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

This is a proceeding to declare the forfeiture of certain valuable jewelry alleged to have been fraudulently smuggled into the United States, through the port of New York, on June 10th, 1902, by one Cassie L. Chadwick. The information contains the usual and requisite averments touching the intentional and fraudulent importation with intent to cheat and defraud the revenue of the United States, and then avers that the property so smuggled had been seized by Charles F. Leach, collector of the Northern District of Ohio, within said District, on May 19, 1905. Adrian H. Larkin, being interested as a claimant, came in and entered his appearance for the sole purpose of denying the jurisdiction of the court below to entertain jurisdiction of any proceeding for the forfeiture of said property. To this plea a demurrer was filed

which, upon argument, was overruled. A reply to the plea was then filed and to this reply the claimant demurred. This demurrer was sustained. The government declining to amend or further plead, the court sustained the plea and dismissed the information. From this judgment the United States have appealed and assigned error.

LURTON, Circuit Judge, after stating the case, said:

The articles against which this forfeiture proceeding was begun were illegally imported through the port of New York. Subsequently they were found in the city of New York and in the possession of the claimant as bailee. These jewels had been pledged by the owner and importer, Mrs. Cassie L. Chadwick, to one J. W. Friend, and Friend placed them in the custody of Adrian H. Larkin, as bailee and attorney. Friend, learning that a claim had been made that same had been illegally and surreptitiously imported through the port of New York by the pledgor, visited the Secretary of the Treasury and made disclosure of his possession of same and his rights, and, as averred by the plea, made an agreement with the secretary that same should be kept in the city of New York open to the inspection and examination of any official of the department. Friend, not being himself a resident of New York, placed them in the custody of the claimant, with authority to conduct any transactions with the treasury department growing out of the claim that same may have been fraudulently imported. At the request of the department, Mr. Leach, collector of the port of Cleveland, went to New York for the purpose of examining the jewelry and determining by inspection whether same had been illegally imported and whether it was subject to seizure and forfeiture. He accordingly applied to Larkin to be allowed an inspection, and this was permitted. The plea then states that Leach "informed said Larkin that certain of said jewelry had not been wrongfully imported and that he did not care to make further examination thereof, but that certain of said pieces he was in doubt about and would like to exhibit them to a person,

located in New York City, who was expert in such matters, for his opinion, and asked permission to take said jewelry away from the office of said Larkin for that purpose, he promising and agreeing to return said property to said Larkin, at his office in New York City, on the afternoon of that same day. Thereupon, said Larkin, relying upon said promise and agreement of said Leach, delivered said property into his possession and custody, receiving from said Leach a receipt therefor in writing, a true copy of which is hereto attached and marked Exhibit A and made a part hereof.

The receipt referred to is in these words:

New York, March 14, 1905.

"Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry, for examination and identification:

"1 Marquise (single stone) diamond ring.

"1 ruby and diamond ring.

"1 diamond ring, about three karets, off color diamond.

"1 ring set with two cabochin rubies and sixteen diamonds.

"2 earrings set with two karet diamond and small pear-shaped diamond pendants.

"1 Marquise (canary) diamond ring.

"1 ring set with diamonds in shape of shield.

"2 empty settings.

"1 ring set with diamond in shape of shield.

"1 ring set with two-five-karet diamonds, twelve diamonds in shank.

"1 six-karet diamond (white) ring.

"1 seven-stone pearl ring.

"2 opal stick pins.

"1 chatelaine watch.

"1 brooch (one oval opal) surrounded by eight diamonds and small spr. rubies.

"1 card case set with jewels.

(Sgd) CHAS. F. LEACH,
Collector of Customs.

It it then averred that said Leach, in violation of his agreement, carried same to Cleveland. That from there he returned certain pieces of the lot to Larkin, as not subject to seizure, and seized the remainder at Cleveland, as having been illegally imported, and then caused this proceeding to be instituted in the District Court for the Northern District of Ohio. To this plea the district attorney replied. So far as this relates to the promise or agreement under which the collector received the property here involved, it is in these words: "That after an examination of the jewelry aforementioned, the said collector informed the said Adrian H. Larkin that he was in doubt as to which specific articles of jewelry and merchandise were unlawfully imported, and that it would be necessary for him to take such articles as to which he was in doubt and further examine them as to whether or not they had been unlawfully imported; and thereupon the said Charles F. Leach received into his care certain of the said articles of jewelry and merchandise, and gave to the said Adrian H. Larkin a receipt for the same, a copy of which is set forth in the plea to the jurisdiction herein filed.

"Plaintiff further says, that it denies that the said Charles F. Leach, collector as aforesaid, promised to the said Adrian H. Larkin that he would immediately return the said articles of jewelry and merchandise which he thus received into his care, and plaintiff further denies that he took said jewelry into his care merely to submit it to an expert in New York for valuation, or that he said to said Larkin or any other person that such was his purpose or intention. But plaintiff says that only in the city of Cleveland, Ohio, could the said collector of customs, Charles F. Leach, ascertain which of said articles were unlawfully imported, and that, with consent of the said J. W. Friend, the said Charles F. Leach brought the said articles of jewelry and merchandise to Cleveland, and that he there made a careful investigation and ascertained that certain of the said articles of jewelry and merchandise which he had thus brought from New York were not

unlawfully imported, and these articles of jewelry and merchandise he forthwith returned to the said A. H. Larkin, at New York; the remaining articles of jewelry and merchandise, that is to say, those mentioned in the information herein filed, he ascertained were unlawfully imported, and thereupon, that is to say on the 19th day of May, 1905, in Cleveland, Ohio, he did seize the said articles of jewelry and merchandise mentioned in the said information, and did claim title in the same for the plaintiff, the said United States."

The reply is ambiguous. The averment is that he promised to return the jewelry to the claimant upon the "afternoon" of the day he received it. The reply is a denial that he promised to "immediately return the said articles." It is that form of pleading which is styled a "negative pregnant," an admission that he received same under a promise to return same and a tender of an issue as to whether his promise was to return same immediately. The averment was that he received the jewelry under a statement that he wished to submit same to an expert in the city. The reply is that he did not take it into his custody "merely to submit to an expert in New York for valuation." The question is not whether he entertained a purpose not expressed, but whether he did not promise to return same when he had carried out the purpose for which he had requested possession. The reply is evasive and does not deny the substantial averments of the plea. "The law refuseth double pleading," said Lord Hobart, in *Slade v. Drake*, Hob. 295, "and negative pregnants, though they be true, because they do inveigle and do not settle judgment upon one point." *Stephen on Pleading* (Heard's), 381, 382.

We quite agree with the court below, that under the circumstances of this case, these jewels were not subject to seizure in Cleveland, but should have been seized in the District of New York. The articles were found in the latter district and should have been there seized.

Section 3072 R. S., is supposed to confer general authority upon every collector to make seizures of property both

within and without his district, if he has ground for believing same subject to seizure. No construction of this section has been found, save that by Judge Benedict, in the case of the *Joshua Leviness*, 9 Ben. 339, where that learned judge expressed the view that the authority to make seizure without the district is of merchandise found upon a vessel seized under Section 3059. We need express no opinion upon this subject. But there is no authority which authorizes a collector who finds smuggled property in one district to carry it into another for the purpose of changing the situs of seizure and adjudication. Section 3086 R. S., provides that when an article is seized it shall be placed "in the custody of the collector or other principal officer of the customs of the district in which the seizure shall be made, to abide adjudication by the proper tribunal. * * *"

The district of seizure is the district in which the suspected article, if merchandise on land, is found. The proper district for an adjudication of forfeiture is the district in which the seizure was made. *The Abby*, 1 Mason 360; *Four Packages v. United States*, 97 U. S. 404. These articles were found in the Southern District of New York. If, as now claimed, the collector for the Northern District of Ohio had authority to seize them wherever found, he should have seized them where in fact he found them and then placed them in the custody of the collector of the port of New York, to hold until adjudication. But he neither seized the jewels, unless his breach of trust in not returning them as he promised to do, be regarded as an official seizure, nor returned them to the possession of the claimant, but carried them to his own district and there went through the form of a seizure. That he took them to his own district in order to determine whether they were subject to seizure, cannot affect the question of jurisdiction. They had been found in New York and should have been seized there. The fact that evidence important to identify them was in Cleveland, and that it was necessary to

carry the jewels to that point for identification, should not, under the circumstances of this case, affect the jurisdiction of seizure and adjudication. When Leach received these jewels, he did so as a collector. So ran his receipt. If he carried them out of the district where they were found for the purpose of identification, he did so in breach of his agreement and should not be suffered to say now that he "found" them in Cleveland and there seized them.

Judgment affirmed.

No. 356.

United States Supreme Court.

October Term, 1907.

No. 356.

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THE UNITED STATES,

PLAINTIFF IN ERROR,

vs.

ADRIAN H. LARKIN, INTERVENOR AND CLAIMANT, ETC.,

DEFENDANT IN ERROR.

Motion by Defendant in Error to Dismiss or Affirm.

HOYT, DUSTIN & KELLEY,
Solicitors for Adrian H. Larkin.

A. C. DUSTIN, of Counsel.

United States Supreme Court.

October Term, 1907.

No. 356.

THE UNITED STATES,

PLAINTIFF IN ERROR,

vs.

ADRIAN H. LARKIN, INTERVENOR AND CLAIMANT, ETC.,

DEFENDANT IN ERROR.

Motion by Defendant in Error to Dismiss or Affirm.

Now comes Adrian H. Larkin, Intervenor and Claimant, etc., defendant in error herein, and moves the Court to dismiss the writ of error in this case for want of jurisdiction:

First—Because no proper certificate of the question of jurisdiction was granted during the term of court at which the judgment was entered.

Second—Because this case is not one where the jurisdiction of the court below was in issue within the meaning of Section 5 of the Judiciary Act of March 3, 1891, and error to the judgment of said court lies to the Circuit Court of Appeals of the United States for the Sixth Circuit and not to this Court.

If the writ of error herein shall not be dismissed, defendant in error moves that the judgment of the said District

Court be affirmed, on the ground that although in the opinion of this Court, the Record may show that this Court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the questions arising on the Record on which the jurisdiction depends, are so frivolous as not to need further argument.

H. C. Austin

Attorney for Defendant in Error.

Hugh C. Austin, Jr. Kelley

Of Counsel.

To the Attorney General of the United States,
Washington, D. C.

Please take notice that on the 14th day of October, A. D. 1907, or as soon thereafter as the same may be heard, a motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of my brief or argument in support of said motion.

P. C. Dustin

Counsel for Defendant in
Error for the purposes of this motion.

WASHINGTON, D. C., Aug 2. 1907.

I hereby acknowledge that I have this day received a copy of the Motion, Notice and Brief mentioned.

Henry M Hoyt

United States Attorney General.

Solicitor General